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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1924

No. 184

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA, PETITIONER

v.

FIDELITY TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1924.
CERTIORARI AND RETURN FILED SEPTEMBER 29, 1924.

(29,922)

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In the United States District Court for the Eastern District of Pennsylvania

December Term, 1920. No. 8118

FIDELITY TRUST COMPANY — H. Gordon McCouch.

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE — George W. Coles.

Docket entries

Mar. 2, 1921.	Præcipe for summons filed.
" 2, "	Summons exit—returnable first Monday in March, 1921.
" 2, "	Statement of claim filed.
" 2, "	Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9, filed.
" 2, "	Notice to file affidavit of defense, filed.
" 8, "	Summons returned: March 2, 1921, served; and filed.
Apr. 5, 1921.	Affidavit of defense filed.
May 27, 1921.	Rule to show cause why judgment should not be entered against deft., for want of sufficient affidavit of defense filed; rule returnable June 10, 1921, at 10 a. m.
2 July 11, 1921.	Argued sur rule for judgment for want of sufficient affidavit of defense.
July 14, 1921.	Opinion, Dickinson, J., discharging rule for judgment, filed.
Aug. 9, 1921.	Præcipe to place case on trial list, filed.
Oct 5, 1922.	Stipulation of counsel as to "certificates," filed.
" 16, "	Stipulation of counsel that case be tried before court without a jury, filed.
Nov. 8, 1922.	Trial before the court without a jury.
" 23, "	Opinion, Dickinson, J., filed.
Dec. 4, 1922.	Præcipe to enter judgment in favor of defendant, filed.
" 4, "	Judgment filed.
" 15, "	Bill of exceptions filed.
" 15, "	Order of court sealing bill of exceptions, filed.
" 15, "	Plaintiff's exceptions to conclusions of law, filed.
" 15, "	Order of court granting exceptions, filed.
" 15, "	Assignments of error, filed.
" 15, "	Petition for writ of error filed.
" 15, "	Order of court granting prayer of petition for writ of error, filed.
" 15, "	Bond sur writ of error in $250 with American Surety Company of New York, surety, filed.
" 15, "	Order of court aproving bond sur writ of error, filed.

3 Dec. 15, 1922. Præcipe for transcript of record sur writ of error, filed.
" 15, " Copy of notice of appeal, filed.
" 15, " Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
" 15, " Citation allowed and issued.
" 27, " Citation returned; service accepted; and filed.

4 In the United States Circuit Court of Appeals, for the Third Circuit

October Sessions, 1922. No. 2960

FIDELITY TRUST COMPANY, PLAINTIFF IN ERROR,

v.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE OF THE FIRST district of the State of Pennsylvania, defendant in error

Stipulation as to contents of record

Filed February 6, 1923

In accordance with provisions of Rule 23 of this court, counsel for plaintiff and defendant agree that the sole question raised by the record in this case is whether the equipment trust certificates, of which a copy will be found on page 18 of the attached exhibit, is subject to stamp tax under provisions of the revenue act of 1921, Title XI, Schedule A, stamp taxes (bonds of indebtedness).

If subject to said tax, the appeal should be dismissed. If not, then appellant is entitled to judgment for $450 with interest from April 23, 1920, the amount of stamps paid for that day under protest and costs.

H. GORDON MCCOUCH,
Attorney for Plaintiff.
GEORGE W. COLES,
United States Attorney,
Attorney for Defendant.

5–6 *Exhibit to stipulation*

Lease Fidelity Trust Company, trustee, to Interstate Railroad Company, dated February 2nd, 1920, and agreement bearing even date therewith between the same parties, creating Interstate Railroad Equipment Trust, Series "C"

7 This agreement, made this 2nd day of February, 1920, between Fidelity Trust Company, trustee (hereinafter called lessor), of the first part, and Interstate Railroad Company (hereinafter called lessee), of the second part, witnesseth:

That for and in consideration as well of the sum of one dollar paid by the lessee to lessor as of the rents and covenants hereinafter mentioned, lessor has let and leased, and by these presents does let and lease to lessee, for the term of ten (10) years from and after the first day of February, 1920 (unless sooner terminated as hereinafter provided), upon the terms and conditions set forth herein, the following described equipment or rolling stock, to wit:

Five hundred (500) all-steel hopper coal cars, 110,000 pounds capacity, to bear road numbers 5000 to 5499, inclusive, such cars to be delivered to lessee f. o. b. cars at works of Pressed Steel Car Company, Pittsburgh, Pa., or at McKee's Rocks, Pa., at the option of the lessor ten (10) to fifteen (15) on or about the 26th day of February, 1920, and a like number every day thereafter until the entire five hundred (500) shall have been delivered.

Article first

Lessee covenants and agrees to pay to lessor, at its office in the city of Philadelphia, as rent and hire for the said railroad equipment and rolling stock:

1. Half yearly on the last day of the months of January and July in each year, the first payment to be made on the last day of July, 1920, and the last payment to be made on the last day of January, 1930.

(a) A sum equal to three (3) per cent. on nine hundred
8 thousand dollars ($900,000), which sum to be thus paid shall be reduced from time to time by an amount equal to three (3) per cent. on such sum as the lessee shall have paid prior to said respective dates to the lessor to be applied in reduction of said sum of nine hundred thousand dollars ($900,000), as specified in paragraph two of this article.

(b) A sum equal to all reasonable expenses incurred by lessor in enforcing the covenants and terms of this lease, including all moneys by it paid for repairs.

(c) A sum equal to the taxes upon the property hereby leased, which lessor or its assigns may be liable to pay and any taxes which may by law be charged against lessor on account of payments of rentals hereunder.

2. Annually on the last day of January in each year for ten years, beginning the last day of January, 1921, the following sums, respectively:

On January 31st, 1921	$90,000
On January 31st, 1922	90,000
On January 31st, 1923	90,000
On January 31st, 1924	90,000
On January 31st, 1925	90,000
On January 31st, 1926	90,000
On January 31st, 1927	90,000
On January 31st, 1928	90,000
On January 31st, 1929	90,000
On January 31st, 1930	90,000

3. As additional advance rental the further sum of two hundred thousand dollars ($200,000) on the second day of February, 1920.

4. Lessee may on the first day of February or August of any year during the continuance of this lease (having given the trustee thirty (30) days' previous notice in writing of its intention so to do) pay all the rentals herein reserved, then unpaid though not yet matured, together with a premium of one (1%) per cent, on the
9 sums provided for in section 2 of article first, and not theretofore paid, and thereupon this lease shall determine and lessee shall be at once entitled to exercise the option to purchase the cars leased hereunder upon payment of one dollar ($1), as provided in article seventh hereof.

Article second

Lessee covenants and agrees with lessor, in addition to its agreement to pay the said rents on the days and in the manner above provided, to keep and maintain at its own expense the said railroad equipment or rolling stock in good order and repair.

Lessee also covenants and agrees with lessor to cause the said railroad equipment or rolling stock and any that may be substituted therefor to be kept consecutively numbered, and to permanently and securely affix upon each side of each car a metal plate bearing the words: "Fidelity Trust Company, trustee, owner, and lessor," and will also permanently mark said words upon each side of each of said cars in such manner as to render said plates and said marks readily visible and so plainly indicate the ownership of said cars. And that it, the lessee, will forthwith replace, at its own cost, any of said railroad equipment or rolling stock which may be destroyed from any cause whatever during the continuance of this lease, by other railroad equipment or rolling stock of equal value as that destroyed, and of substantially as good material, character, and construction; and that it, the lessee, will not allow the name of any person, association, or corporation to be placed on any of said railroad equipment or rolling stock as a designation which might be interpreted as a claim of ownership thereof: Provided, however, The lessee may cause said railroad equipment or rolling stock and each or any item thereof to be marked with its own name or its initials or any pseudonym it may have heretofore adopted or may hereafter adopt for convenience of identification of its lessee interest therein.

10 Article third

Lessee further covenants and agrees to furnish to lessor once in every calendar year during the continuance of this lease, upon written demand therefor, an accurate inventory of the said railroad equipment or rolling stock in actual service, the numbers and description of such as may have been destroyed and substituted by

others, the numbers of those repaired during the preceding year, and the number of those at the date of such statement undergoing repair or in the shops for repair, and that lessor shall have the right to inspect the said railroad equipment or rolling stock during the continuance of this lease by an agent or agents to be appointed by the said lessor or its assigns, whose reasonable compensation, however, shall be paid by lessee.

Article fourth

Lessee further covenants that there shall be no judgment or transfer of its rights or interest in said railroad equipment or rolling stock under this lease, nor any underletting of said leased property, without the consent of the said lessor or its assigns endorsed hereon, and that lessor or its assigns shall have the right to declare this lease terminated in case of any unauthorized sale or transfer thereof, and the election of lessor or its assigns to terminate this lease under this clause shall give lessor or its assigns the same right to retake said railroad equipment and rolling stock, as provided in article fifth in case of breach of any covenant of this lease; and a transfer by insolvency or any judicial process shall be deemed a breach of this covenant: Provided, however, The foregoing provision, to the contrary notwithstanding, lessee may in its ordinary course of business use or permit the use of said railroad equipment or rolling stock and every or any item thereof upon lines of railway other than those owned by lessee, and may, as is usual in its ordinary course of business, permit the interchange of said railroad equipment or rolling stock and every or any item thereof with other companies operating lines of railroad.

11 Article fifth

That in case lessee shall make default in the payment of any part of said rental for more than thirty (30) days after the same shall have become payable, or shall fail after thirty (30) days' previous notice in writing from lessor to keep the said railroad equipment or rolling stock in good serviceable condition, or to perform any of the other covenants herein contained to be performed on its part, lessor or its assigns may declare this lease terminated, and thereupon all installments of rent reserved hereunder, whether said installments shall then have fallen due or not, and all moneys by this agreement required to be paid by lessee shall at once become forthwith due and payable, and shall be forthwith collectible, notwithstanding such termination of the lease, and lessor or its assigns may, by an agent or agents to be appointed for the purpose, enter upon the railroad or premises whereupon or wherein the said railroad equipment or rolling stock may be and may retake the said railroad equipment or rolling stock and withdraw the same from the said railroad or premises.

Article sixth

That in case such retaking is had or rightfully demanded by the lessor or its assigns in pursuance of this lease, lessee will, at its own expense, forthwith and in the usual manner and at the usual speed of freight trains, draw the said railroad equipment and rolling stock to such points on its railroad as shall reasonably be designated by lessor or its assigns, and will deliver the same to lessor or its assigns, and it is hereby expressly covenanted between lessor and the said lessee that performance of this covenant as herein set forth is of the essence of the contract between the parties and that upon application to any court of equity having jurisdiction in the premises the said lessor or its assigns shall be entitled to a decree against lessee requiring specific performance hereof. Such retaking of possession of the
12 said equipment by the lessor shall not be a bar to the recovery by the lessor of any sums accruing thereafter as rental until such sum is realized as with the net proceeds of sale or other disposition of said equipment by the lessor shall be sufficient for the payment in full of all taxes and expenses incurred by the lessor as aforesaid, and all other rentals provided to be paid hereunder, it being the intention of this agreement that the lessee shall be bound at all events to pay the full amount of the rental herein specified to be paid, being relieved by the retaking of the equipment only to the extent of the net cash actually realized by the lessor from sale or other disposition of the equipment.

Article seventh

The said lessor hereby covenants and agrees with lessee that upon the due and proper payment of the rentals, interest, installments, and moneys which lessee has herein covenanted to pay, it, the said lessor shall and will upon the payment of lessee to lessor of the additional sum of one dollar ($1.00) sell, assign, and transfer, or cause to be sold, assigned, or transferred to lessee, its successors, and assigns, or its or their nominee or nominees as its or their absolute property, all of the railroad equipment and rolling stock held under this lease, and evidence such sale and transfer by a proper bill of sale, so that thereupon and thereafter the absolute ownership in said railroad equipment and rolling stock shall be and become vested in lessee, its successors and assigns, or in its nominee or nominees as the case may be.

Until payment by lessee to the said lessor, its successors or assigns, of the entire purchase price of said equipment, and all the installments and amounts as herein specified, and until all of the obligations of lessee hereunder shall have been fully complied with and performed, and until said bill of sale shall have been delivered, the title to the equipment shall not pass to or vest in lessee, but shall be and remain in said lessor, its successors and assigns, notwithstanding the

delivery to and possession and use of said equipment by the said lessee.

13 And it is expressly covenanted and agreed that said cars are being constructed by the Pressed Steel Car Company in accordance with specifications and under a contract approved by lessee, and that lessor shall not be liable for delay in the delivery to lessor of any of the cars, composing said equipment, nor for any default on the part of the manufacturers thereof, nor for any defect in any of said cars, nor shall anything herein be construed as a warranty on the part of said lessor in respect thereof, nor as a representation in respect of the value thereof.

In witness whereof the said lessor and the said lessee have caused their corporate seals to be hereunto affixed and duly attested at Philadelphia, Pennsylvania, all as of the day and year first above written.

Signed, sealed, and delivered in the presence of

FIDELITY TRUST COMPANY,
By J. C. NEFF, *Vice President.*

Attest:
[SEAL.]

C. F. TOOMEY,
Assistant Secretary.

INTERSTATE RAILROAD COMPANY,
By W. H. HARDING, *Vice President.*

Attest:
[SEAL.]

L. F. LENTZ, *Secretary.*

14 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, William M. Kitzmiller, a notary public in and for said county, in said State, residing at Philadelphia, in the city and county of Philadelphia, personally appeared C. F. Toomey, known to me to be the asst. secretary of Fidelity Trust Company, a corporation that executed the within instrument, who being duly sworn according to law, deposeth and saith: That he is the asst. secretary of Fidelity Trust Company; that he was personally present at the execution of the above written instrument and saw the common seal of the said corporation, Fidelity Trust Company, duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said Fidelity Trust Company; and that the above written instrument was duly signed, sealed, and delivered by and as and for the act and deed of the said Fidelity Trust Company, by authority of the board of directors thereof, for the uses and purposes therein mentioned; and that the name of this deponent subscribed to said instrument of writing as asst. secretary of said corporation in attestation of the due execution and delivery of said instrument of writing is of this deponent's own, proper, and respective hand-

writing and signature, which said signature deponent hereby acknowledges.

C. F. TOOMEY.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of February, A. D. 1920.

I am not a stockholder, director, or officer of the above named company.

[SEAL.] WILLIAM M. KITZMILLER,
Notary Public.

My commission expires Jan. 8, 1921.

9 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, William M. Kitzmiller, a notary public in and for the said county in said State, residing at Philadelphia, in the city and county of Philadelphia, personally appeared L. F. Lentz, known to me to be the secretary of Interstate Railroad Company, a corporation, that executed the within instrument, who being duly sworn according to law, deposeth and saith: That he is the secretary of Interstate Railroad Company; that he was personally present at the execution of the above written instrument and saw the common seal of the said corporation, Interstate Railroad Company, duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said Interstate Railroad Company, and that the above written instrument was duly signed, sealed, and delivered by and as and for the act and deed of the said Interstate Railroad Company, by authority of the board of directors thereof, for the uses and purposes therein mentioned; and that the name of this deponent subscribed to said instrument of writing as secretary of said corporation in attestation of the due execution and delivery of said instrument of writing is of this deponent's own, proper, and respective handwriting and signature, which said signature deponent hereby acknowledges.

L. F. LENTZ.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of February, A. D. 1920.

I am not a stockholder, director, or officer of the above-named company.

[SEAL.] WILLIAM M. KITZMILLER,
Notary Public.

My commission expires Jan. 8, 1921.

10 For value received, the Virginia Coal & Iron Company hereby warrants and becomes surety to the Fidelity Trust Company, trustee, for the faithful performance by the Interstate Railroad Company of its obligations under within lease, and for the payment by it to the said trustee of the rentals thereby reserved, when and as the same become due and payable.

Witness the corporate seal of the Virginia Coal & Iron Company. Dated February 2nd, 1920.

THE VIRGINIA COAL & IRON COMPANY,
By D. B. WENTZ, *President.*

[SEAL.]

Attest:
L. F. LENTZ,
Secretary.

11 This agreement, made the 2nd day of February, 1920, between Fidelity Trust Company (hereinafter called trustee), of the first part, and Interstate Railroad Company (hereinafter called Railroad Company), of the second part.

Whereas, by indenture of lease bearing even date and executed contemporaneously herewith, and hereto attached, the said trustee did lease to Interstate Railroad Company certain railroad equipment or rolling stock therein particularly described, for a certain term and upon the rental in said indenture of lease particularly set forth;

And whereas, subscriptions to the amount of nine hundred thousand dollars ($900,000) have been secured through Brown Brothers & Company, bankers, of the city of Philadelphia, Penna., to a fund to be known as "Interstate Railroad Equipment Trust, Series 'C,'" which said fund is to be applied by trustees towards payment of the purchase price of the railroad equipment and rolling stock particularly described in said indenture of lease;

And whereas, the said trustee proposes to secure to the parties subscribing to said fund of nine hundred thousand dollars ($900,000) the payment thereof in ten (10) consecutive annual installments, as follows:

On February 1st, 1921	$90,000
On February 1st, 1922	90,000
On February 1st, 1923	90,000
On February 1st, 1924	90,000
On February 1st, 1925	90,000
On February 1st, 1926	90,000
On February 1st, 1927	90,000
On February 1st, 1928	90,000
On February 1st, 1929	90,000
On February 1st, 1930	90,000

12 with interest from the first day of February, 1920, at the rate of six per cent (6%) per annum, payable semiannually on the first day of February and the first day of August in each year, payment of said principal and interest to be made as herein set forth, and the evidence of the rights of the subscribers to said fund to be by certificates in the form herein set forth:

Now, therefore, this agreement witnesseth:

First. The trustee covenants and agrees that upon the due execution and recording of said lease and of this agreement, and when the amount of money necessary to pay for said rolling stock or

equipment shall have been deposited with it, it will deliver to Brown Brothers & Company, of Philadelphia, certificates aggregating nine hundred (900) in substantially the following form, to wit:

(Form of car trust certificate)

Total issue, $900,000. Interstate Railroad Equipment Trust. Series C. No. —. $1,000. 900 shares of $1,000 each

Fidelity Trust Company (hereinafter termed the trustee) hereby certifies that the bearer hereof is entitled to one (1) share of one thousand dollars ($1,000) in Interstate Railroad Equipment Trust, Series "C," in accordance with the provisions of a certain agreement bearing date the second day of February, 1920, between the trustee, as party of the first part, and Interstate Railroad Company as party of the second part.

The principal of this certificate will be payable on the first day of February, 19—, upon the surrender hereof at the office of the trustee, and in the meantime dividends thereon will be payable as evidenced by the dividend warrants attached hereto, but this certificate is subject to call at any interest period on payment of principal and of a premium of one per cent (1%) of the principal
13 thereof. Both principal and dividends are payable in gold coin of the United States of the present standard of weight and fineness at the office of the trustee in the city of Philadelphia, but only from and out of the deferred rentals when paid as provided for in a lease of five hundred steel coal cars made by the Fidelity Trust Company, trustee, to Interstate Railroad Company, bearing date the second day of February, 1920, which rentals are payable to the trustee for the benefit of the holders of this and other certificates amounting at par to nine hundred thousand dollars ($900,000), to which lease, and the agreement hereinbefore mentioned, reference is made for a statement of the rights of the holders of such certificates.

The additional advance rental of two hundred thousand dollars ($200,000) provided by article first, section 3, of said lease, when collected by the trustee, shall be used by it in part payment for said rolling stock, and settlement of expenses incurred in the creation of the equipment trust aforesaid.

The holder of this certificate may have the same registered on the books of the trustee, which registration shall be noted on the back hereof, and thereafter the principal shall be transferred only upon the said books by the registered holder, or his duly authorized representative, unless the same shall have been transferred to bearer, in which case the principal shall be payable to the bearer hereof, the dividend warrants being always payable to bearer.

Witness the corporate seal of the trustee, attested at Philadelphia, Penna., this second day of February, 1920.

FIDELITY TRUST COMPANY,
Trustee.

By ——— ———,
President.

Attest:

——— ———,
Secretary.

There shall be endorsed on each certificate, over the signature of the secretary of the Virginia Coal & Iron Company and its corporate seal, the following:

"I hereby certify that the Virginia Coal & Iron Company has become surety to the Fidelity Trust Company, trustee, for the payment, when due, by the Interstate Railroad Company of the rentals reserved under the said lease made by said trustee to said railroad company, dated February 2nd, 1920.

Attest:

[SEAL.] ——— ———,
Secretary of the Virginia Coal & Iron Company."

Each of said certificates shall have dividend warrants thereto attached, in general form as follows, to wit:

(Form of dividend warrant)

Due to the bearer hereof on the first day of ———, 19—, on surrender hereof at the office of Fidelity Trust Company, Philadelphia, the sum of thirty 00/100 dollars ($30.00) in United States gold coin, being the semiannual dividend on certificate No. ——— of Interstate Railroad Equipment Trust, Series "C," payable only out of the rentals under the lease referred to in the said certificates.

FIDELITY TRUST COMPANY.

By ——— ———,
Treasurer.

The said certificates shall be numbered from 1 to 900, inclusive, and by the terms thereof, the principal shall be payable as follows:

Nos.
1 to 90, both inclusive, on the first day of February, 1921.
91 to 180, both inclusive, on the first day of February, 1922.
181 to 270, both inclusive, on the first day of February, 1923.
271 to 360, both inclusive, on the first day of February, 1924.
361 to 450, both inclusive, on the first day of February, 1925.
451 to 540, both inclusive, on the first day of February, 1926.
541 to 630, both inclusive, on the first day of February, 1927.
631 to 720, both inclusive, on the first day of February, 1928.
721 to 810, both inclusive, on the first day of February, 1929.
811 to 900, both inclusive, on the first day of February, 1930.

All dividends on each and every of said certificates shall cease after the principal thereof shall have become due unless default be made in the payment of said principal.

Second. Until said certificates can be engraved or lithographed, the trustee may execute in lieu of said engraved or lithographed certificates and subject to the same limitations and conditions, temporary certificates (without dividend warrants), substantially of the tenor of the form of certificates hereinbefore set forth, or temporary receipts entitling the holders thereof to permanent engraved or lithographed certificates when the latter are ready for delivery. Upon the surrender of said temporary certificates or receipts, the trustee shall issue in exchange therefor permanent engraved or lithographed certificates for the amount of the temporary certificates or receipts surrendered, and of an equivalent face value and date of maturity, and until so exchanged the said temporary certificates or re-
22 ceipts shall have the same force and effect as permanent engraved or lithographed certificates issued hereunder.

Third. The trustee agrees to keep at its office in the city of Philadelphia a register in which the holders of any such certificates may have the same registered as herein provided.

Fourth. The trustee further covenants to perform and, as far as possible with due diligence, to enforce the performance of all and singular the terms, conditions, and covenants of the said lease, and to apply and distribute the rentals thereunder when and as the same shall be received for the following purposes, to wit:

(a) To the payment of such necessary and reasonable expenses of the trust connected with the said railroad equipment or rolling stock as are usual in cases of trust estates.

(b) To the payment of any taxes upon the income or property of the trust and any tax which may be by law deductible from the principal of said certificates or the dividends thereon and which it may be required to pay or retain.

(c) To the payment of the individual warrants attached to the said trust certificates when and as the same become payable.

(d) To the payment and redemption of the principal of the said certificates when and as the same shall become payable. The said warrants and certificates to be cancelled upon payment thereof.

It is distinctly understood and agreed that neither the trustee nor any successor in the trust shall be liable or responsible for any matter or thing connected with the trust intended to be hereby created except for its own or their own wilful and intentional breach thereof.

Fifth. The railroad company agrees forthwith to make
23 payment upon demand of the reasonable expenses of said trustee and of all taxes hereinabove mentioned, for which the trustee may be liable or which it may by law be required to deduct from the principal of the said certificates or the dividends thereon.

Sixth. It is further covenanted and agreed that, in case the railroad company shall at any time make default in the payment of any part of the rental in said lease reserved for more than thirty

(30) days after the same shall become payable, or shall fail to keep and perform any or all of the terms and covenants of the said lease, the said trustee shall have the right to declare the principal of all of said car trust certificates hereby intended to be secured to be due so far as the rights of the holders thereof are concernd, and thereupon to enforce all the terms and stipulations of said lease, and in case the trustee shall retake possession of said railroad equipment or rolling stock, it may either hold or lease or dispose of said railroad equipment or rolling stock, or so much thereof as it may deem necessary, in such manner, at such public or private sale for cash or upon credit, as the trustee may deem most beneficial; and the proceeds of such lease or sale shall be applied by the trustee to the payment, after deducting the expenses of the trust and all taxes which the trustee may by law be required to pay in respect of the trust property or the certificates aforesaid or the dividends thereon.

(1) To the dividend warrants then due, and

(2) To the principal of all the said outstanding certificates, whether the same shall have matured by their terms or not, in full, if such proceeds shall be sufficient, and if not, then pro rata.

And such retaking possession of the said railroad equipment or rolling stock by the trustee shall not be a bar to the recovery by the trustee from the said railroad company for the future accruing rent until such sum is realized as with the proceeds of the sale of said railroad equipment and rolling stock is sufficient for the payment in full of all taxes and expenses as aforesaid together with all
24 accrued dividend warrants and the principal of all of the said certificates.

In witness whereof the said parties hereto have caused their respective corporate seals to be hereunto affixed and duly attested at Philadelphia, Pennsylvania, all as of the day and year first above written.

Sealed and delivered in the presence of—

FIDELITY TRUST COMPANY,
Trustee.
By J. C. NEFF, *Vice President.*

Attest:
[SEAL.]

C. F. TOOMEY,
Assistant Secretary.
INTERSTATE RAILROAD COMPANY,
By W. H. HARDING, *Vice President.*
L. F. LENTZ, *Secretary.*

Attest:
[SEAL.]

25 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, William M. Kitzmiller, a notary public in and for the said county in said State residing at Philadelphia, in the city and county of Philadelphia, personally appeared C. F. Toomey, known

to me to be the asst. secretary of Fidelity Trust Company, a corporation that executed the within instrument, who being duly sworn according to law, deposeth and said: That he is the asst. secretary of Fidelity Trust Company; that he was personally present at the execution of the above written instrument and saw the common seal of the said corporation, Fidelity Trust Company, duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said Fidelity Trust Company, and that the above written instrument was duly signed, sealed, and delivered by and as and for the act and deed of the said Fidelity Trust Company, by authority of the board of directors thereof, for the uses and purposes therein mentioned; and that the name of this deponent subscribed to said instrument of writing as asst. secretary of said corporation in attestation of the due execution and delivery of said instrument of writing is of this deponent's own, proper, and respective handwriting and signature, which said signature deponent hereby acknowledges.

C. F. TOOMEY.

In witness whereof I have hereunto set my hand and affixed my official seal this second day of February, A. D. 1920.

I am not a stockholder, director or officer of the above named company.

[SEAL.] WILLIAM M. KITZMILLER,
Notary Public.

My commission expires Jan. 8, 1921.

26 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, William M. Kitzmiller, a notary public in and for the said county in said State residing at Philadelphia, in the city and county of Philadelphia, personally appeared L. F. Lentz, known to me to be the secretary of Interstate Railroad Company, a corporation that executed the within instrument, who being duly sworn according to law, deposeth and saith: That he is the secretary of Interstate Railroad Company; that he was personally present at the execution of the above written instrument and saw the common seal of the said corporation, Interstate Railroad Company, duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said Interstate Railroad Company, and that the above written instrument was duly signed, sealed, and delivered by and as and for the act and deed of the said Interstate Railroad Company, by authority of the board of directors thereof, for the uses and purposes therein mentioned; and that the name of this deponent subscribed to said instrument of writing as secretary of said corporation in attestation of the due execution and delivery of said instrument of writing is of this deponent's own, proper, and respective handwriting and signature, which said signature deponent hereby acknowledges.

L. F. LENTZ.

In witness whereof I have hereunto set my hand and affixed my official seal this second day of February, A. D. 1920.

I am not a stockholder, director, or officer of the above-named company.

[SEAL.] WILLIAM M. KITZMILLER,
Notary Public.

My commission expires Jan. 8, 1921.

27-32 Recorded in the office for the recording of deeds in and for the city and county of Philadelphia in Mortgage Book 1225, page 26, &c.

Witness my hand and seal of office this 3rd day of February, Anno Domini, 1920.

[SEAL.] WILLIAM J. BENHAM,
Deputy Recorder of Deeds.

VIRGINIA,
County of Wise, to wit:

In the clerk's office of said county on the 23rd day of February, 1920, the foregoing writing was admitted to record and recorded in Deed Book 141, page 97, &c.

Teste:

R. R. ROBERTS,
Clerk.

33 In United States District Court

[Title omitted.]

Opinion

Filed November 23, 1922

Sur Trial by the Court Sitting Without a Jury

DICKINSON, *J.*

This case, although in form assumpsit, raises the sole question of the legality of a tax levy. The very question now raised was raised and disposed of on a rule for judgment. Judgment was refused. This necessitated a trial hearing, but the question to be determined has in no wise changed. We have filed herewith formal findings of fact and conclusions of law. The fact findings are no more than a recapitulation of the averments of the statement of claim, all of which, except the conclusions of law therefrom, are admited by the affidavit of defence. This is because there is no controversy over the facts and the cause is really a case stated, upon which nothing more is needed than the judgment of the court.

Having already determined the question now raised, we feel bound to follow the ruling as the law of the case until the ruling made is reversed. Ordinarily, we would rest the judgment
34 now to be entered on this proposition and would not rediscuss the question. The earnestness and force with which the contrary view to that taken has been pressed upon us and as the

opinion then handed down has been given a somewhat different interpretation from that which we had in mind would be given, a word of comment is not out of place.

We stated before, and the experience has been repeated, that when we were listening to the argument of counsel for plaintiff, the impression produced was that these certificates had not been taxed, but when we came to read the act of Congress we became convinced that Congress had taxed them.

We have already found, and now repeat the finding, that as we read this act of Congress these certificates are not among the taxable things which Congress, by the verbiage employed, has expressly named, and that the words commonly known as corporate securities can not be read to refer to these certificates without ignoring the rule of reference to the nearest antecedent nor without imputing to Congress a grammatical error.

The able counsel who tried the case for the plaintiff has, with tactful force, used this finding to hammer home his point (as he was justified in seeking to do) that, because of this, we had in upholding the imposition of the tax put ourselves in conflict with the ruling in U. S. v. Isham, 84 U. S. 496. The thought intended to be conveyed was doubtless not very happily expressed. It is upon a rereading seen to be not wholly clear. The thought meant to be expressed was not that a thing was taxable because it was something within the general purpose of Congress to tax and was in consequence one of the things taxed notwithstanding the admitted fact that it was not among the named things which Congress had taxed.

The thought is wholly different from this. It is that Con-
35 gress had by name designated some of the things which were taxed; it had also taxed other things, not designating them by name or by their form but by words of general description, which indicated what they were so that they could be recognized and known without regard to their form or how they were labeled.

These certificates are not included in the first class and can not be put there without changing the verbiage employed by Congress. They are, however, in the second class, and the putting of them there involves no forced construction, because it was the general purpose of Congress to tax everything from which an income was derived by way of interest. This is evidenced, among other things, by the reference to what are known as corporate securities. It is true that the two obstacles mentioned are in the way of including these certificates among the things taxed by the name corporate securities, but these obstacles are not insuperable, nor are they in the way of including these certificates among the things taxed by description as certificates of indebtedness which are within the expressed purpose of Congress to tax.

The whole argument ends with the establishment of the following abstract and concrete propositions:

If Congress has taxed one thing, the tax can not be extended to another thing by the Executive nor by the courts merely because

it is thought that the other thing ought to be taxed, or that the purpose or intention of Congress was to tax it. The question is not what the courts think should have been taxed or what Congress, by its indicated general purpose, intended to tax, but what has been taxed. Congress may tax by indicating in any way what is taxed. It may indicate the taxed thing by naming it or by describing what it is in form or by what it is in substance and effect. When
36 Congress has indicated, whatever the way in which this is done, the thing which is taxed the taxpayer can not repeal or nullify the taxing act nor escape the tax by merely changing the name of the thing. Nor can he escape the tax by changing the mere form of the thing unless Congress has limited the tax to things of another form. Apply these abstractions to the fact situation here. Car trust certificates in whatever form other than this are admittedly taxed because they are certificates of indebtedness issued by some person. This plaintiff can not exempt this car trust certificate by merely changing its name to that of a Philadelphia plan car trust certificate. It is described in the act as a certificate of indebtedness issued by a railroad company. The holder will get nothing unless the railroad company keeps its promise to pay the money advanced with interest. This creates an indebtedness.

For the avowed purpose of escaping the tax or for any other purpose this plaintiff can not succeed in escaping it by changing the mere form of the writing and calling it a bailment, if in substance it remains just what it was before, if Congress has described the taxed thing according to what it is and not limited the tax to the described thing, provided it has a prescribed form. If Congress had taxed car trust certificates when they had one form, then it would not have taxed the Philadelphia form of certificate, if that was a different form. When, however, Congress taxes a thing by descriptive words which include all car trust certificates, including those issued under the Philadelphia plan, as well as all other plans, then these certificates are taxed. In other words, whenever the taxed thing is described according to what the thing is, no change made will take it out of the tax list other than a change in the thing itself.

A car trust certificate in the common form is in realty and
37 fact a chattel mortgage. The plan of a bailment, which is the Philadelphia plan, is likewise in reality and effect, and hence in real fact, a chattel mortgage.

As before remarked, the discussion of the question to be determined causes embarrassment because of the fact that to reach a judgment of what the law is we must have a concept of the fact situation to which the law as found is held to apply, and to express this concept we must use words, and the difficulty is to find words to use which does not by their use imply the legal conclusion which we are to make. This embarrassment flows from the circumstance that the tax is due because of the existence of things, which things are in some instances given names and in others are described by the act of Congress. If we call the thing here by a name by which

the taxable thing designated in the act of Congress is not known, we in effect say it is not the thing which Congress has taxed. If we call it by a name which is the name by which Congress has designated the thing taxed, we say it is the thing which Congress has taxed.

The question stated

We will, because of the difficulty suggested, frame the question as follows: Are railroad corporate securities issued in the form known as the Philadelphia form of car trust certificates taxable under the act of Congress of 1918? The question can only be answered after we have in mind what it is the act of Congress taxes and what these certificates issued under the Philadelphia plan are. We can then and then only compare the two things and find them to be identical or different.

The battle on behalf of the plaintiff is fought from the position that it is the form of the thing which determines whether it is
38 taxable. This position can be held only if Congress has described the taxable thing by its form or by a name which indicates a special form and can be turned if the taxable thing is described by some designation of what it really is, and forms and names are used merely as illustrations of what things are made taxable. "Writings which evidence indebtedness by whatever name" would, we assume, make taxable any paper writing which answered to this description, and it could not be successfully argued either that the tax was limited to such forms of indebtedness as were in such common use as to be designated by name, or that writings which did in fact evidence indebtedness were not taxable because they were known by some name by which their special form was designated.

The true doctrine of the cases cited, commonly expressed in the aphorism that a "doubtful tax is not a lawful tax," is that a lawful tax must have its rise in the will of Congress and not in inferences drawn from such expressed will by the Executive or the judiciary.

The will of Congress expressed in this tax act, as we read it, is to tax every instrument in writing, whatever its form, by the ownership of which the holder has the legal right to receive from any person a principal sum of money which has been advanced directly or indirectly by the holder, and as long as payment is withheld, interest upon that sum. Such an instrument, whatever its form, is a "certificate of indebtedness," which is one of the things taxed by this act. Distinctions are made for a purpose, but as the common phrase expresses it, "distinctions without a difference" are no distinctions at all. The moment we begin to give different names to the same thing, we are indulging either in merely verbal distinctions, or if the things are the same things in a different form,
39 we are merely designating difference in form. When anything comes to be known by a name and a tax is levied and the thing taxed is described by that name, the fair inference is that

the taxing power meant to limit the tax to the things known by that name, although the things thus designated in common speech differ from other things only in form and not in what is called essence. When, however, the thing taxed is not thus denominated but the taxed thing is otherwise described, then a tax upon anything which comes fairly within that description is lawfully taxed. The words here are "certificates of indebtedness issued by any person." These words serve the purpose not of a Christian name and surname but are words of general description, indicating the thing thus taxed by what it really is and not by its name or form. The thing here claimed to be taxed has a name by which it is generally known among investors. The name is the Philadelphia Plan of Car Trust Certificates. They are issued by "a person," and they are in their real nature "certificates of indebtedness." It is true they do not have that precise form, but this act of Congress clearly negatives the thought that form has anything to do with the question before us. "In whatever form" is expressed throughout the whole act.

A railroad company wishes to borrow a sum of money and to pledge its rolling stock as security for the payment of interest and principal. The sum is so large that the only practicable way of raising it is to have a large number of investors join in making up the required sum. The transaction takes the form of a third party as "trustee" taking title to the rolling stock by purchase or otherwise, the railroad company agreeing to make to such trustee periodical payments, which in a given time will exactly repay the principal sum, with interest, whereupon the title automatically reverts to the railroad company. The trustee, in the meantime, issues to the investors certificates or acknowledgments that they are, in proportion to the sum each has contributed, the real owners of the obligation of the railroad company.

If the real transaction here is changed by the form it assumes, then a mortgage in the form used in Pennsylvania is not a pledge of property as security for the payment of a sum of money, with interest, but is a conveyance of the property. This suggests a helpful analogue. Suppose a tax law in Pennsylvania taxed all pledges of property to secure the payment of money, with interest. Suppose the same law imposed a different tax upon all conveyance or transfers of property. Under which law (if either) would a mortgage in the common form be taxable? In reality it is a pledge; in form it is a conveyance.

The argument of counsel for plaintiff leads to the view that a mortgage would either not be subject to any tax or that it would be taxed as a conveyance. The view entertained by us on the rule for judgment was, and to that view we adhere, that a mortgage is a pledge of property and would be taxable as such, notwithstanding that it is commonly known as a mortgage and is in form of a conveyance.

We adhere also to the view that these car trust certificates are taxable, just as other car trust certificates are taxable, because these are in reality, although not in form, the same as the others. They are all alike car trust certificates. The very best evidence of this is that the holders so call them and wish them to be so known, although it is true they have added to the family name the "given name" of Philadelphia plan. When the words "car trust certificates" appear in the literature of the bankers, brokers, and
41 investors, no one doubts that these certificates are included.

Why, then, should there be any doubt that the descriptive words in this act which apply to other car trust certificates apply also to these? It must be admitted, as it was before admitted, that these certificates are in form not within the verbiage of the act of Congress.

The very capable counsel for plaintiff seizes upon this as an admission that they are not taxable because in his view the form and the verbiage are the only things which count. Without meaning to withdraw the admission or to qualify it, we feel at liberty to express the same thought, in different phrase, in the hope of expressing it more clearly. This, however, is not for the purpose of escaping the attack of counsel by turning it aside, for we further admit the thought in the mind of counsel is in direct antagonism with the thought we meant to express. The thought is that if with only the form of a bailment in mind we apply to it the verbiage or word form of "certificates of indebtedness," there is admittedly a misfit. If, however, with the thought of what a car trust certificate really is in mind we again apply the same words as a descriptive phrase, we see that the description fits.

Our task, as before indicated, really is to compare concepts. One is a concept of the thing which Congress has taxed; the other is a concept of the thing before us. Thus compared they are alike or different. Now concepts are almost wholly dependent upon the viewpoint. Philadelphia investors a few years ago were familiar with ground rents and mortgages as forms of investment. In form they radically differ. Are they different in real substance? The answer depends upon the viewpoint. From the viewpoint of the investor (and this is the concept of the common mind) they are the same thing. Each is an investment implying the laying out of money to yield an income by way of interest, with principal and in-
42 terest secured by the pledge of real property. From the viewpoint of the conveyancer or of the lawyer they are wholly different. To begin with one is real estate; the other personalty. There is in a real sense the same difference as that between car trust certificates issued under the Philadelphia plan and other car trust certificates. It is the difference between a bailment and a conditional sale or between a bailment and a chattel mortgage. The final purpose, in the sense of the use they are meant to serve, is however the same. If looked at from the point of view of one whose concept of

an interest bearing investment is that of a debt owing by some one to the holder, it is a "certificate of indebtedness issued by a person." The acts deals with investments of this general character and especially with those "commonly known as corporate securities." Congress expresses the common will and when it uses words in general use and does not speak in technical terms, it uses words in the sense they have in common speech.

The commands of this act are laid upon investors—those who possess what is termed vested capital which they employ for the purpose of assuring the receipt of an income. There is every reason, because of this, to give to the words of the act the meaning the words have in common speech qualified (if there is any qualification in this) only by the sense in which those to whom the words are addressed will understand them. Congress did not choose the words employed in this act from the standpoint of a conveyancer or of a text-writer on the subject of bailments or of pledges of property, real or personal, nor are its words directed to such persons. It was because of this justified in ignoring the fine distinctions in which such persons must perforce indulge. It is the common man (the investor) who must obey the command of Congress, and in
43 order to obey he must understand what he is to do. He can only understand that the command is from the words in which it is expressed, and it is the fair and just thing to give those words the meaning which they bring to his natural ears, and there is neither sense nor justice in assuming that he wears artificial auricular contrivances.

Ground rent and mortgage investments afford us the use of another analogue. A tax law which taxed a thing denominated by either of these names would not tax the other. A tax law, however, which designated the thing taxed neither by name nor by a description of its form but by general words of description applicable indifferently to either would describe both if the general purpose was manifested to tax all income bearing investments or such part of all investments as would fairly include both of these.

Our conclusion is on the trial what it was on the rule for judgment that these car trust certificates are subject to the tax imposed by this act of Congress.

To give definiteness of date to the judgment entered, no judgment is now rendered but jurisdiction of the cause is retained for the purpose of entering formal judgment for the defendant, with costs, and leave is granted any party in interest to move for such judgment.

In order to give to the parties whatever benefit there may be in having the findings of fact and conclusions of law phrased as each prefers them to be, we find the facts to be as the plaintiff has stated them to be in its statement of claim, and state the conclusions of law in accordance with defendant's requests.

Findings of fact

1. The facts are found as set forth in plaintiff's statement of claim in paragraphs 1 to 11, both inclusive, and the fact statement in paragraph 12 exclusive of the legal conclusion therein stated.

44 Conclusions of law

These are found as set forth in defendant's requests, each and all being found as requested.

Prior to the opinion quoted above, plaintiff had taken a rule for judgment for want of a sufficient affidavit of defence. Said rule was declined in an opinion by the said court, which opinion is referred to by the court in its opinion upon the trial of the case, and for this reason is set forth in full below so that it may be considered as a part of the opinion upon trial.

45 In United States District Court

[Title omitted.]

Opinion

Filed July 14, 1921

Sur Rule for Judgment

DICKINSON, *J.*

This case is in effect a case stated, in the determination of which we are asked to decide a question of law. The question, broadly stated, is whether the "certificates" held by the plaintiff as trustee are taxable. We, in consequence, limit our attention to this.

The taxing authorities give the impression of their attitude as first one of uncertainty and then one of doubt. We have given the subject of the tax the name of "certificates" in order to get a word as colorless as possible, because any word or words definitely descriptive of what the thing sought to be taxed really is anticipates the ruling to be made, inasmuch as what the thing is determines whether or not it is taxable. It is conceded that Congress might have taxed these "certificates" had they been known or thought of and had Congress so willed. The whole question is, has it taxed them? It has if they fall within the verbiage of the acts of Congress;
46 otherwise they remain untaxed. It is doubtless the fact that the draughtsman of the tax laws had the purpose in mind to tax everything from which income was expected to be derived by granting to one person the use of the money of another. In the effort to make sure of the accomplishment of this purpose resort was had to enumeration and description. The descent from the general to the particular and specific, however careful the attempt to make the list of the latter full and all embracing, always has the result of at

least rendering doubtful the inclusion of what is not by name listed. All forms of so-called securities or investments issued by corporations, whether expressive of indebtedness or shares in anything the corporation possesses, are without doubt taxed, as are also all forms of instruments expressive of the indebtedness of any person to the holder.

We were strongly impressed by the argument at bar that these two general lines of thought marked the limits of what had been taxed. The question before us then resolved itself into an inquiry into what these "certificates" are. They are in strictness neither evidences of debt nor of shares in corporate assets. This is because of their peculiar form and of the plan under which created. A dealer in so-called investments or securities would without doubt or hesitation list them under the name or designation of "Car trust certificates," for such they are. There are many such "on the market." They all have the same general purpose and character. They are called for because some railroad or other transportation company is in need of rolling stock or other equipment and is without funds or credit with which to supply itself, and there is a legal or other difficulty in the way of a direct pledge of the property. They are issued under a number of different plans. The one with which
47 we are concerned is known as the Philadelphia plan. Those willing to share in the venture are invited to place their contributions in the hands of an acceptable trustee. The rolling stock, or other property, is then purchased in the name of this trustee as owner. The trustee then enters into a form of bailment or conditional sale agreement with the carrier, the periodical and final payments upon which are sufficient to pay the interest on the investment and the principal at maturity. The contributors in the meantime hold the certificates or acknowledgment of the trustee of their respective shares in the venture.

It will thus be seen that in strictness the only obligation in the nature of a debt or promise to pay money is the obligation and agreement of the carrier to pay the agreed price for the hire and use of the property or the rentals as they are commonly termed. The trustee is a mere purse, and only in a secondary sense can be said to owe anything to any one other than faithfulness to its trust obligations, and is not a debtor even in this secondary sense unless and until and as the moneys which belong to the contributors come into its hands. The certificate is not with the literal verbiage of the act of Congress not being "a certificate of indebtedness issued by any person" nor "an instrument issued by any corporation." If the taxing hand has been laid only upon these specific forms of what are generally known as securities, it must be withdrawn from the "trust certificates" now under view. This would mean that the are the exceptions among this general class of securities and are exempt because the very effort made in the framing of the law to include all forms of securities of this general character has, in verbal nicety, excluded them. The act of Congress, however, includes more than

the two kinds of securities mentioned above, because we think
48 it includes everything "known generally as corporate securities." That these trust certificates are so known would not be denied. The denial would be of the correctness of this construction of the act of Congress. There are two obstacles to be surmounted before reaching this construction. One is that the rule of the nearest antecedent makes the quoted phrase relate to and serve as a definition of the described kinds of "instruments issued by corporations," and the other is that the finding of a meaning to tax all instruments "commonly known as corporate securities" involves the presence of a grammatical error in the act of Congress. Neither of these obstacles are however insurmountable, if this was the meaning of Congress, and we so find. Nor do we see any conflict between a ruling that these certificates are taxable and the doctrine of the cases to which we have been referred that there is no such thing as a doubtful tax.

U. S. v. Isham, 84 U. S. 496

The question now presented is admittedly a close one, but this does not necessarily make for the taxpayer. The true doctrine is that neither the executive nor the judicial departments nor both can levy a tax. This can only be done by Congress. When, however, Congress has acted and the tax questioned is found to have been levied, the mere fact that in the light of the particular case in which the question is raised the meaning of Congress might have been more clearly expressed, does not justify a refusal to give that meaning effect. The real truth back of the whole discussion is that if these certificates are not taxable it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the obligation of debt entered into by the carrier corporation. The real security is the promise not of one
49 corporation but of two to pay to the certificate holders the sums due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for equipment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. This it is true was not the form of the promise, but such it was in substance because it was a promise to pay a sum which was the exact (and not accidental but prefixed) equivalent of the advances, with interest. It is however, and none the less true, that if for any reason Congress has not included these certificates, no tax can be imposed. The impression to this effect made by the argument at bar has been removed by what seems to us to be the sufficiently expressed will of Congress to tax them.

We have disposed of the case as if on trial hearing with all the facts which enter into the discussion established, understanding such to be the wish of all parties, it being conceded that all these facts are in the record.

Rule for judgment discharged.

50 In United States Circuit Court of Appeals for the Third Circuit

No. 2960 (List No. 15). March term, 1923

FIDELITY TRUST CO., PLAINTIFF IN ERROR

vs.

EPHRAIM LEDERER, COLLECTOR, DEFENDANT IN ERROR

Order assigning district judge

Filed March 8, 1923

In error to the District Court of the United States for the Eastern District of Pennsylvania.

And now, to wit, this 8th day of March, A. D. 1923, it is ordered that Hon. Charles L. McKeehan, district judge for the eastern district of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make a full court.

Per curiam:

BUFFINGTON,
Circuit Judge.

[File indorsement omitted.]

51 In United States Circuit Court of Appeals

[Title omitted.]

Opinion

Filed July 5, 1923

And afterwards, to wit, on the eighth day of March, 1923, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable J. Warren Davis, circuit judges, and Honorable Charles L. McKeehan, district judge, and the court, not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the fifth day of July, 1923, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

52 [Title omitted.]

Before BUFFINGTON and DAVIS, Circuit Judges, and MCKEEHAN, District Judge.

BUFFINGTON, *Circuit Judge:*

This case concerns the assessment of a stamp tax on car equipment trust certificates issued under what is known as the Philadelphia plan. The Government assessed and collected such tax, basing its right so to do on the provision of the revenue act of 1918, quoted

in the margin.* The plaintiff, having paid the tax under protest, brought suit against the collector to recover the same back, but the court held it had been properly assessed, and entered judgment for the defendant. Thereupon the plaintiff sued out this writ, and the question involved is whether the equipment trust certificates here concerned fall within the purview of the statute as being "certificates of indebtedness * * * issued by any corporation with interest coupons * * * known generally as corporate securities."

Turning to that question, we note that the certificate issued
53 by the plaintiff, a copy of which is printed in the margin,** does not evidence, or certify to, any indebtedness owing by

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* "1. Bonds of indebtedness.—On all bonds, debentures, or certificates of indebtedness issued by any person and all instruments whereby to make it such by a corporation with interest coupons or in registered form known generally as corporate securities, on each one hundred dollars of face value or fraction thereof, five cents: Provided, that every renewal of the foregoing shall be taxed as a new issue: Provided further, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured."

** Total issue, $900,000. Interstate Railroad Equipment Trust. Series C. No. —. $1,000. 900 shares of $1,000 each

Fidelity Trust Company (hereinafter termed the trustee) hereby certifies that the bearer hereof is entitled to one (1) share of one thousand dollars ($1,000) in Interstate Railroad Equipment Trust, Series "C," in accordance with the provisions of a certain agreement bearing date the second day of February, 1920, between the trustee, as party of the first part, and Interstate Railroad Company, as party of the second part.

The principal of this certificate will be payable on the first day of February, 19—, upon the surrender hereof at the office of the trustee, and in the meantime dividends thereon will be payable as evidenced by the dividend warrants attached hereto, but this certificate is subject to call at any interest period on payment of principal and of a premium of one per cent (1%) of the principal thereof. Both principal and dividends are payable in gold coin of the United States of the present standard of weight and fineness, at the office of the trustee in the city of Philadelphia, but only from and out of the deferred rentals when paid as provided for in a lease of five hundred steel coal cars made by Fidelity Trust Company, trustee, to Interstate Railroad Company, bearing date the second day of February, 1920, which rentals are payable to the trustee for the benefit of the holders of this and other certificates amounting at par to nine hundred thousand dollars ($900,000), to which lease, and the agreement hereinbefore mentioned, reference is made for a statement of the rights of the holders of such certificates.

The additional advance rental of two hundred thousand dollars ($200,000) provided by article first, section 3, of said lease, when collected by the trustee, shall be used by it in part payment for said rolling stock and settlement of expenses incurred in the creation of the equipment trust aforesaid.

The holder of this certificate may have the same registered on the books of the trustee, which registration shall be noted on the back hereof, and thereafter the principal shall be transferred only upon the said books by the registered holder, or his duly authorized representative, unless the same shall have been transferred to bearer, in which case the principal shall be payable to the bearer hereof, the dividend warrants being always payable to bearer.

Witness the corporate seal of the trustee, attested at Philadelphia, Penna., this second day of February, 1920.

FIDELITY TRUST COMPANY,
Trustee,
By ——— ———, *President.*

Attest:
——— ———,
Secretary.

(There shall be indorsed on each certificate, over the signature of the secretary of the Virginia Coal & Iron Company and its corporate seal, the following:)

I hereby certify that the Virginia Coal & Iron Company has become surety to the Fidelity Trust Company, trustee, for the payment, when due, by the Interstate Railroad Company of the rentals reserved under the said lease made by said trustee to said railroad company, dated February 2nd, 1920.

Attest:
[SEAL.]
———— ————,
Secretary of the Virginia Coal & Iron Company.

(Each of said certificates shall have dividend warrants thereto attached, in general form as follows, to wit:)

Due to the bearer hereof on the first day of ———, 19—, on surrender hereof at the office of Fidelity Trust Company, Philadelphia, the sum of thirty-seven dollars ($37.00) in United States gold coin, being the semiannual dividend on certificate No. ——— of Interstate Railroad Equipment Trust, Series "C," payable only out of the rentals under the lease referred to in the said certificates.

FIDELITY TRUST COMPANY,
By ——— ———, *Treasurer.*

the plaintiff to the bearer, nor is it the coupon contract usually accompanying corporate securities, to pay periodic interest indebtedness. On the contrary, it is simply a certificate of the right of its holder to participate in a rental payable under a certain lease, which lease restricts the right of the certificate holder to payment solely "from and out of the deferred rentals when paid as provided for in a lease of 500 steel cars made by Fidelity Trust Company, trustee, to Interstate Railroad Company, bearing date the 2nd day of February, 1920, which rentals are payable to the trustee for the benefit of the holders of this and other certificates amounting at par to $900,000, to which lease and the agreement hereinbefore mentioned reference is made for a statement of the rights of the holders of such certificates." These certificates are issued under what is known as the Philadelphia plan, which was devised many years ago to provide for such a legal bailment of railroad equipment as would allow railroads to hold possession and use property owned by third parties. The legal method of financing such transactions was subscription to a fund—in this case $900,000—which was handled by a trustee company and used to buy railroad equipment—in this case 500 steel cars—which were then leased to a railroad—in this case the Interstate Railroad Company—at an annual rentals, the cars meanwhile being marked "Fidelity Trust Company, Trustee, owner and lessor."

54 It will thus be seen that when the transaction is viewed as a whole, as must be the case, and the certificate in question measured from that standpoint, no indebtedness is involved or obligation incurred by the trustee to the holder, but it is simply a certificate of the holder's right to proportionate participation in a rental when paid.

Car trust certificates such as here involved have been so long and so largely used in the financial world and are so vital a factor in the financing and equipment of railroads that it would seem that Congress had it intended taxing them would have so covered them by specific designation or by proper generic description as to leave no question of its intent.

In our judgment the law and facts are with the plaintiff, and the judgment of the District Court is therefore reversed and the cause remanded to said court for further procedure in accordance with this opinion.

56 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Filed July 5, 1923

In error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed, and the cause remanded to said court for further proceedings in accordance with the opinion of this court.

PHILADELPHIA, *July 5, 1923.*

Per curiam:

BUFFINGTON,
Circuit Judge.

[File endorsement omitted.]

57 In United States Circuit Court of Appeals

UNITED STATES OF AMERICA, *ss:*

Mandate

Filed Aug. 4, 1923

The President of the United States of America, to the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania, greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between Fidelity Trust Company (plaintiff below), plaintiff in error, and Ephraim Lederer, collector of internal revenue (defendant below), defendant in error, a judgment was entered in the said district court on the fourth day of December, 1922, which judgment is of record in the office of the clerk of the said district court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said district court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, more fully and at large appears.

58 And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and twenty-three, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and the cause remanded to said court for further proceedings in accordance with the opinion of this court.

PHILADELPHIA, *July 5, 1923.*

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and

justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the fourth day of August, in the year of our Lord one thousand nine hundred and twenty-three (1923).

SAUNDERS, LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[File indorsement omitted.]

59 The United States Circuit Court of Appeals

Clerk's certificate

I, William P. Rowland, deputy clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of Fidelity Trust Company, plaintiff in error, vs. Ephraim Lederer, collector of internal revenue, defendant in error, No. 2960, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this fifth day of September, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the United States the one hundred and forty-eighth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

60 In the Supreme Court of the United States

October term, 1923

EPHRAIM LEDERER, COLL'R., PETITIONER
v.
FIDELITY TRUST COMPANY, RESPONDENT
No. 582

Writ of certiorari and return

Filed Nov. 16, 1923

Stipulation as to return to writ of certiorari

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
H. GORDON MCCOUCH,
Counsel for Respondent.

OCT. 30, 1923.

[File indorsement omitted.]

61 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation as to return to writ of certiorari in the case of Fidelity Trust Co., plaintiff in error, vs. Ephraim Lederer, collector, defendant in error, No. 2960, on file, and now remaining among the records of the said court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 15th day of November, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the United States the one hundred and forty-eighth.

[SEAL.] SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Being informed that there is now pending before you a suit in which Fidelity Trust Company is plaintiff in error and Ephraim Lederer, collector of internal revenue, is defendant in error, No. 2960, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,
63 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[File indorsement omitted.]

○

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE OF THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA, petitioner,
v.
FIDELITY TRUST COMPANY, RESPONDENT.

No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of Ephraim Lederer, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, rendered in the above-entitled case on July 5, 1923, reversing a judgment entered by the District Court, which held that the stamp taxes paid under protest by the respondent could not be recovered.

STATEMENT.

This is an action brought by the respondent to recover stamp taxes paid to the Government, under protest, by virtue of the Revenue Act of 1918, Title XI, Schedule A, Stamp Taxes (Bonds of Indebtedness) (40 Stat. L. 1057, 1133, 1135), on the issuance of certain car-trust certificates.

This case was tried in the District Court for the Eastern District of Pennsylvania and resulted in a judgment for the defendant. The Circuit Court of Appeals, however, held that, when the transaction is viewed as a whole, the certificates upon which the stamp taxes were paid did not carry any indebtedness or obligation from the trustee to the holder, but that they were simply a certificate of the holder's right to proportionate shares of the rental when paid, and accordingly reversed the judgment of the District Court. Petitioner now seeks to have this judgment of the Circuit Court of Appeals, reversing the judgment of the District Court, reviewed by certiorari.

QUESTION INVOLVED.

The only question to be considered in this case is whether the equipment-trust certificates are subject to stamp tax under the provisions of the Revenue Act of 1918, Title XI, Schedule A, Stamp Taxes (Bonds of Indebtedness).

THE FACTS.

By an agreement between respondent, the Fidelity Trust Company, and the Interstate Railroad Company the former purported to lease to the latter five hundred (500) steel hopper cars. The agreement provides for the payment annually by the railroad company for a period of ten years of one-tenth ($90,000) of the amount of car-trust certificates, which were issued by the trustee, the respondent herein, to the various subscribers to the trust fund. In this trust fund, known as the "Interstate Rail-

road Equipment Trust, series C," provision was made for the issuance of nine hundred (900) car-trust certificates of the denomination of $1,000 each, to be issued to those who had subscribed to the fund of $900,000. The certificates in question were issued under what is commonly known as the "Philadelphia Plan."

The agreement secured to the subscribers the payment in ten consecutive annual instalments of $90,000 each, "with interest from the first day of February, 1920, at the rate of six per cent (6%) per annum, payable semiannually on the first day of February and the first day of August in each year, payment of said principal and interest to be made as herein set forth." Attached to each of the certificates are the ordinary forms of interest coupons, which, however, are described as "dividend warrants." They provide for the payment of $30 upon surrender thereof, "being the semiannual dividend * * * payable only out of the rentals under the lease referred to in the said certificates." A copy of the certificates is printed below for the convenience of the court.

> Due to the bearer hereof on the 1st day of ————, 19—, on surrender hereof at the office of Fidelity Trust Company, Philadelphia, the sum of Thirty ——— 00/100 Dollars ($30.00) in United States Gold Coin, being the semiannual dividend on Certificate No. —— of Interstate Railroad Equipment Trust Series C, payable only out of the rentals under the Lease referred to in the said Certificates.
>
> FIDELITY TRUST COMPANY, *Trustee.*
>
> By ——— ———, *Treasurer.*

REASONS FOR GRANTING THE PETITION.

1. The so-called "car-trust certificates," issued under the "Philadelphia Plan," are taxable under the Revenue Act of 1918 (subdiv. 1, sched. A, Title XI).

2. The instant case involves a question of general public importance, and a final determination of this question will avoid multiplicity of suits.

3. The question involved may in its application to other issues of "car-trust certificates" involve a substantial sum of money to the Treasury of the United States.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION.

I.

The so-called "Car-Trust Certificates," issued under the "Philadelphia Plan," are taxable under the Revenue Act of 1918 (Subdiv. I, Sched. A, Title XI).

The Government assessed and collected the stamp tax in question, basing its right so to do on the provision of the Revenue Act of 1918, subdivision (1), Schedule A, Title XI, which reads as follows:

> 1. *Bonds of Indebtedness.*—On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities, on each one hundred dollars of face value or fraction thereof, five cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Provided further*, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater then the debt secured, the tax shall be based upon the amount secured.

It is the contention of the Government, which is urged upon this Court for its earnest consideration, that the Act of Congress speaks for itself, and no strange or unusual meaning can be read into it, as contended for by the respondent. Since there has been no judicial determination or construction given

to the statute involved, or to the issues before the Court, other than the instant case, it is incumbent upon the Government to analyze the words of the Revenue Act of 1918, which are pertinent to a solution of the instant case.

The first part of the statute to be considered is whether the certificates in question are "certificates of indebtedness."

In connection with this point, the Government is content to quote the language of his Honor, Judge Dickinson, in the determination of the instant case in the District Court:

> Congress may tax by [illegible] in any way what is taxed. [illegible] dictate the taxed thing by naming [illegible] describing what it is in form or [illegible] in substance and effect. [illegible] has indicated (whatever the way [illegible] which this is done) the thing which is taxed, the taxpayer can not repeal or nullify the taxing act nor escape the tax by merely changing the name of the thing. Nor can he escape the tax by changing the mere form of the thing unless Congress has limited the tax to things of another form. Apply these abstractions to the fact situation here. Car trust certificates (in whatever form other than this) are admittedly taxed because they are certificates of indebtedness issued by some person. This plaintiff can not exempt this car trust certificate by merely changing its name to that of a Philadelphia plan car trust certificate. It is described in the act as a certifi-

> cate of indebtedness issued by a railroad company. The holder will get nothing unless the railroad company keeps its promise to pay the money advanced with interest. This creates an indebtedness.

Going a little further into the wording of the Act we find that it specifically taxes "all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities." It will not be denied that a car-trust certificate is an "instrument," because it is a document or writing; because a car-trust certificate falls within the general purview of the meaning of the word "instrument" as it is used in the popular sense. Since a car-trust certificate must be conceded to be an "instrument," the next question to be answered and settled is whether the "instrument" has been "issued by any corporation." It will neither be denied that the Fidelity Trust Company, respondent herein, was and is a corporation, nor that the certificates were issued by it. The "interest coupons" mentioned in the statute are similar to the "dividend warrants" which are attached to the car-trust certificates. "Interest coupons" and "dividend warrants" serve the same purpose to the holder; that is, they are the means of collecting the interest on the principal which has been advanced by the certificate holder, which, in the instant case, amounts to six per cent per annum, payable semiannually.

Finally we come to the question of whether a car-trust certificate is a "corporate security" within the meaning of the Act. If a corporation issues a security, obviously it is a corporate security. This term "security" has a various meaning, according to the following accepted authorities:

Bouvier's Law Dictionary, 3d Revision, Vol. 3, p. 3032:

> That which renders a matter sure; an instrument which renders certain the performance of a contract.

Words and Phrases, 2d Series, Vol. 2, p. 500:

> One definition of the word "security" is that it is something which makes the enjoyment or enforcement of a right more secure or certain.

Webster's New International Dictionary, 1919 Edition:

> An evidence of debt or of property, as a bond, stock certificate, or other instrument, etc.; a document giving the holder the right to demand and receive property not in his possession.
>
> Securities on property; giving a lien or claim on property, which may be specified, the security then being termed specific, * * *.

Whitely v. *Arbogast*, 17 Ohio S. & C. Pl. Dec. 569, cities Bouvier, quoted above.

Mace v. *Buchanan*, 52 S. W. 505, applies the term "securities" to "live and negotiable commercial obligations, * * * and other obligations considered generally safe or secure."

II.

The instant case involves a question of general public importance.

In the cases of *Field* v. *United States*, 205 U. S. 292, *Forsyth* v. *Hammond*, 166 U. S. 506, and *United States* v. *Rimer*, 220 U. S. 547, this Court in effect said that it would grant a petition for a writ of certiorari if the case is "one of gravity and general importance" and contains a "matter of general interest to the public." It is believed that the instant case is of such general public importance that it falls within the cases cited above. The decision of the Circuit Court of Appeals is detrimental to the interests of the Government in the collection of revenue under the Revenue Act of 1918 and is directly opposite to the ruling of the Treasury Department.

It is not possible to estimate the amount of taxes involved in the instant case for the reason that the stamps are purchased in large quantities from the various collectors without any designation of the use to which they are to be put. In the last few years a large number of the car-trust certificates have been issued. It is therefore apparent that if the decision of the Circuit Court of Appeals is allowed to stand, numerous other suits may be filed for the recovery of stamp taxes. It is therefore highly desirable to have this Court finally pass upon the legality of this tax so as to avoid a multiplicity of suits being filed, with strong possibility of conflicting decisions, in already congested courts.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be issued to review the judgment of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEPTEMBER, 1923.

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26419—25†—1

In the Supreme Court of the United States

OCTOBER TERM, 1924

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE for the First District of the State of Pennsylvania, petitioner
v.
FIDELITY TRUST COMPANY

No. 184

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

STATEMENT

The Fidelity Trust Company sued Lederer, collector of internal revenue, for $450, and interest, the amount paid under protest for internal revenue stamps which the collector required the trust company to attach to an issue of well-known securities, commonly called equipment trust certificates.

The District Court decided in favor of the collector, but the Circuit Court of Appeals reversed the judgment of the District Court and held that the statute did not require these instruments to be stamped. This writ of certiorari brings up that judgment for review.

The sole question is whether the equipment trust certificates are subject to stamp tax under the provisions of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057 (not the Act of 1921 as erroneously stated in the transcript of record, p. 2).

THE STATUTE

Section 1100, Title XI, of the Act provides (40 Stat. 1133):

> That on and after April 1, 1919, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

Subdivision 1, Schedule A, Title XI (40 Stat. 1135), provides:

> 1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form,

known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Proided further*, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured.

Article 8, Regulations 55, approved February 24, 1919, provides:

> *Instruments issued by corporations in numbers, under a trust indenture, are bonds.*—Instruments containing the essential features of a promissory note, but issued by corporations in series, secured by a trust indenture, either in registered form or with coupons attached, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and in some instances for redemption before maturity, or similar provisions, are bonds, within the meaning of the statute, whether called bonds, debentures, or notes.

THE FACTS

These equipment trust certificates were issued pursuant to the provisions of two agreements between the Fidelity Trust Company and the Interstate Railroad Company, each dated February 2, 1920, executed contemporaneously, and the one attached to the other and constituting, in effect, one agreement creating the "Interstate Railroad equip-

ment trust series C" (page 2). The first agreement appears in the record beginning at the bottom of page 2. The second agreement, which recites the first one, is set forth in the record beginning on page 9.

The first agreement purports to be a lease from the Fidelity Trust Company, as trustee, to the Interstate Railroad Company for the term of 10 years from the 1st day of February, 1920, unless sooner terminated as therein provided, of 500 steel-hopper coal cars, to be delivered at the rate of 10 to 15 a day, beginning on or about the 26th day of February, 1920. The following are the important provisions of the lease (page 3):

The lessee—that is, the railroad company—agrees to pay the lessor, the trust company, as rent and hire for the cars—

1. Half yearly on the last day of the months of January and July in each year—

(A) A sum equal to three per cent on $900,000, which sum is to be reduced from time to time by an amount equal to three per cent on such sum as the lessee shall have paid prior to said respective dates to the lessor, to be applied in reduction of the said sum, $900,000, as specified in paragraph 2 of Article 1.

(B) The reasonable expenses of the lessor in enforcing the covenants of the lease, and

(C) A sum equal to the taxes upon the property leased which the lessor may be liable to pay and any

taxes which by law may be charged against the lessor on account of payments of rentals under the lease.

2. Annually, on the last day of January in each year, for ten years, beginning the last day of January, 1920, the sum of $90,000.

3. As additional advance rental, the sum of $200,000 on the 2d of February, 1920 (page 4).

4. Lessee may on the 1st day of February or August of any year, during the continuance of the lease, pay all the rentals therein reserved and unpaid, though not yet matured, together with the premium of one per cent on the sums before mentioned under 2; whereupon the lease shall determine and the lessee shall be entitled to purchase the cars upon payment of $1 (page 4).

By Article 2 the lessee agrees to keep the cars in good order and repair at its own expense, and also to cause the cars, or any that may be substituted therefor, to be numbered, and to affix on each car a metal plate bearing thereon the words "Fidelity Trust Company, as trustee, owner and lessor"; and also to replace forthwith at its own cost any of said cars which may be destroyed; not to allow any name to be placed on any of the cars as a designation which might be interpreted as a claim of ownership thereof, provided, however, that the lessee may cause the cars to be marked with its own name or its initials or any pseudonym which it may have adopted for convenience of identification.

By Article 4th (page 5), the lessee covenants against any judgment or transfer of its rights or

interest in the equipment and against any underletting without the consent of the lessor; and that the lessor shall have the right to declare the lease terminated in case of any unauthorized sale or transfer, provided, however, that the lessee may, in its ordinary course of business, use or permit the use of the equipment upon other lines of railway, and may permit the interchange of said equipment with other railroad companies.

By Article 5th (page 5), in case of default in payment of the rental, or failure to perform any of the covenants of the lease, the lessor may declare the lease terminated; whereupon all installments of rent whether then due or not, shall at once become due and payable, and the lessor may enter and retake the equipment.

By Article 6th (page 6) it is provided that such retaking shall not be a bar to the recovery of any sums accruing thereafter as rental until such sum is realized as, with the net proceeds of sale or other disposition of the equipment, shall be sufficient for the payment in full of taxes or expenses incurred by the lessor, and all rentals provided to be paid under the lease, "it being the intention of this agreement that the lessee shall be bound at all events to pay the full rental herein specified to be paid, being relieved by the retaking of the equipment only to the extent of the net cash actually realized from the lessor by sale or other disposition of the equipment."

By Article 7th (page 6) the lessor agrees that upon the payment by the lessee of all moneys which it

agrees to pay the lessor will, upon payment of the additional sum of $1, cause the equipment to be sold, assigned, and transferred to the lessee as its absolute property; and it is further agreed that the cars are being constructed by the Pressed Steel Car Company in accordance with the specifications and under a contract approved by the lessee; that the lessor shall not be liable for delay in the delivery of the cars, nor for any default upon the part of the manufacturers, nor from any defect in the cars, "nor shall anything herein be construed as a warranty upon the part of the lessor in respect thereof, nor as a representation in respect to the value thereof." There is indorsed upon the lease (page 8) an agreement whereby the "Virginia Coal & Iron Company warrants and becomes surety to the Fidelity Trust Company, trustee, for the faithful performance by the Interstate Railroad Company of its obligations under within lease and for the payment by it to the said trustee of the rentals thereby reserved, when and as the same become due and payable."

The second agreement, dated the same day, starts by reciting the lease "bearing even date and executed contemporaneously herewith and hereto attached," and reciting that subscriptions to the amount of $900,000 have been secured through Brown Bros. & Company, bankers, to a fund to be known as "Interstate Railroad Equipment Trust, Series C," which fund is to be applied toward the payment of the purchase price of the equipment described in the

lease; and further reciting that the trustee proposes to secure to the parties subscribing to that fund the payment thereof in ten consecutive annual payments of $90,000 each (corresponding to the rentals described in Article First of the lease, page 3), with interest at the rate of 6 per cent per annum, "payment on said principal and interest to be made as herein set forth, and the evidence of the rights of the subscribers to said fund to be by certificates in the form herein set forth."

After these recitals the agreement provides:

> First. The trustee agrees that upon the execution and recording of the lease and "this agreement," and when the amount of money necessary to pay for the equipment shall have been deposited with it, it will deliver to Brown Bros. & Company nine hundred certificates in form following.

Then follows (page 10) the form of certificate. The certificate is headed:

> Total issue, $900,000. Interstate Railroad Equipment Trust, Series C. No. —, $1,000. 900 shares of $1,000 each.

This certificate, executed under seal by the Fidelity Trust Company, Trustee, certifies that the bearer is entitled to one share of $1,000 in the Interstate Railroad Equipment Trust in accordance with the provisions of the agreement between the trustee and the railroad company. The principal will be payable on the 1st day of February, 19—, upon the surrender of the certificate at the office of the trustee, and, in

the meantime, dividends will be payable as evidenced by the dividend warrants attached. The certificate is subject to call at any interest period, on payment of principal and a premium of one per cent. Both principal and dividends are payable in gold coin of the United States of the present standard of weight and fineness, but only from and out of the deferred rentals when paid as provided for in the lease, which rentals are payable to the trustee for the benefit of the holders of the certificates, to which lease and second agreement reference is made for the statement of the rights of the holders of the certificates. The additional advance rental of $200,000 provided by Article First, Section 3, of the lease shall be used in part payment for the equipment and the settlement of expenses incurred in the creation of the trust. The holder of the certificate may have it registered on the books of the trustee, to be noted on the back of the certificate.

The agreement then provides that each certificate shall bear an endorsement by the Virginia Coal & Iron Company, certifying that it has become surety to the Fidelity Trust Company for the payment by the Interstate Railroad Company of the rentals reserved in the lease. Each certificate shall have dividend warrants thereto attached in the following form:

> Due to the bearer hereof on the first day of ——, 19—, on surrender hereof at the office of Fidelity Trust Company, Philadelphia, the sum of thirty 001/00 dollars ($30.00) in

United States gold coin, being the semi-annual dividend on certificate No. —— of Interstate Railroad Equipment Trust, Series "C," payable only out of the rentals under the lease referred to in the said certificates.

FIDELITY TRUST COMPANY,
By ——— ———, *Treasurer.*

The certificates shall be numbered from one to nine hundred, inclusive, and maturity dates so arranged that ninety shall be paid each year, the maturity dates corresponding to the payments to be made by the Railroad Company under Article First of the lease.

Then follow various provisions of the kind usually found in trust agreements, providing for the issuance of temporary receipts pending the engraving of the definitive certificates, for the keeping by the trustee of a register of the holders of registered certificates, a covenant by the trustee to perform and, as far as possible, with due diligence to enforce the performance of the terms of the lease, and to apply and distribute the rentals when and as they shall have been received, first, to the payment of its necessary and reasonable expenses; second, to the payment of any taxes upon the income or property of the trust; third, to the payment of the individual warrants attached to the trust certificates; fourth, to the payment and redemption of the principal, and the usual agreement that the trustee shall not be liable or responsible for any matter or thing con-

nected with the trust except its own willful and intentional breach.

The railroad company agrees to pay the expenses of the trustee and all taxes for which the trustee may be liable or which it may be required to deduct from the principal of the certificates or the dividends thereof.

Then follows the customary default clause, which gives the trustee the right, in the event of default, to declare the principal of all the certificates due, and to enforce all the terms and the stipulations of the lease; and should the trustee take possession of the equipment it shall not be a bar to the recovery from the railroad company for the future accruing rent until such sum is realized as is sufficient for the payment in full of all taxes and expenses, accrued dividends, warrants, and principal of all the said certificates.

The agreements bear certificates showing recording in the office of the Recorder of Deeds in Philadelphia and in the office of the Clerk of Wise County, Virginia.

In brief, these agreements provide for an issue of "car trust certificates" to the amount of $900,000, bearing interest at 6 per cent payable semi-annually, with maturities of from one to ten years, redeemable at par and 1 per cent premuim, and secured by a first lien upon 500 steel cars costing $1,100,000, of which amount $200,000 was paid in cash.

The scheme is known as the "Philadelphia Plan."

ARGUMENT

The instruments in question are corporate securities within the meaning of the statute

The Government insists that equipment obligations, by whatever name called, whether issued under the Philadelphia plan or in any other form, are subject to the stamp tax under the statute already quoted, as "instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities."

Car trust certificates have long been known as a favorite form of investment security, grouped under the general term "equipment obligations." They are issued in various forms, but the underlying security is always a lien upon the rolling stock of railroads. They are classed with bonds by writers upon corporate finance.

Conyngton, in "Corporate Organization and Management" (1917), discusses them in chapter 51, entitled "Bonds," describing them, at page 441, as "car trust bonds," saying:

> Car trust or equipment trust bonds or certificates are issued by a trustee, who holds for their security equipment purchased or leased by a railroad company. * * * When the final payment is made by the railroad company, the deed of trust by which the property is held is released and the equipment becomes the property of the purchasing company.

Jones, in "Corporate Bonds and Mortgages" (3d edition of Railroad Securities, revised), discusses

them in chapter 5, section 128, with reference to their relation to mortgages containing an after-acquired property clause, and points out that nearly all the States (naming them and citing the statutes) have passed laws prescribing the conditions under which "contracts for the sale or lease of rolling stock," with a reservation of title in the vendor until full payment of the purchase price is made, shall be valid against creditors or purchasers without notes. See also Thompson on Corporations, 2d edition, Vol. III, §2689.

William H. Walker, dean of Duquesne University School of Accounts, Finance and Commerce, in "Modern Business" (Volume 11, on "Corporation Finance"), chapter 9, page 145, discusses them under the heading "Bonds Secured by Leases," and says:

> As a rule, leases serve as collateral for bonds only in the purchase of railway equipment, and especially when a closed first mortgage or the after-acquired property clause interferes with making a new direct loan against the equipment to finance its purchase. These obligations are known as car or equipment trust bonds, or car trust certificates.

After discussing the various forms in which the securities are issued, he continues (at page 147):

> Equipment trust bonds, such as the car trust certificates above mentioned, are very secure and enjoy an increasingly broad market. This is because the equipment covered by the lease is practically indispensable to the railway and can be taken from it instantly in the event of default.

The rules of the Interstate Commerce Commission require "equipment bonds, equipment notes, or car trust notes," to be included in Account No. 755 of General Balance Sheet Accounts, under the heading of "Funded debt unmatured." (See Classification of Income, Profit and Loss, and General Balance Sheet Accounts for steam railroads, prescribed by the I. C. C., issue of 1914.)

One of the latest books upon this subject is entitled "Equipment Obligations," by Kenneth Duncan, sometime Fellow in Economics in the University of Michigan, with an introduction by I. C. Scharfman, of the same university. (D. Appleton & Co., 1924.) This book traces in a most interesting manner the history of securities of this type, discusses their place in corporate finance, their investment qualities, their legal aspects, and gives some significant statistics. In the Introduction it is said (Page XXVII):

> Because of the rapid development of their use, the steady increase in their amount, they are constantly growing in importance from the standpoint of the investor. They are the chief means of financing railroad equipment, which is generally recognized as the most urgent need of the transportation system in recent years.

In Chapter II, page 23, there is a table showing the amount of these securities outstanding in each year from 1890 to 1920 and their relation to the total funded debt of American railroads, the figures,

as is stated, being based upon reports to the Interstate Commerce Commission. It appears that in 1890, the total amount of equipment obligations outstanding was $49,478,215 as against a total funded debt of $4,574,576,131, while in 1920, the figures were, respectively, $646,155,492 and $11,254,946,156. While the total funded debt, therefore, increased about two and one-half times, the equipment obligations increased about thirteen times.

The author says of the Philadelphia plan (page 16), the one here in question, that it was first used in 1868 for furnishing equipment to the Lehigh Coal and Navigation Company. The difficulty which gave rise to its use was the rule prevailing in Pennsylvania that a conditional sale of chattels was not valid against the claims of third parties, so resort was had to a contract in the form of bailment. He says (page 17):

> Such an arrangement was obviously a subterfuge, but had always been sustained by the Pennsylvania courts as valid against third parties, although in most other jurisdictions courts at first were inclined to frown upon the device and to give it no greater legal effect than if it had been a conditional sale or a chattel mortgage.
>
> It is, of course, needless to say that the device has now become so universally used and has become so thoroughly respected in the courts that there is no longer any suggestion of "subterfuge" or irregularity attaching to such transactions. The plan is now a

practical business expedient, based upon a legitimate legal fiction.

The author points out (page 227) that five States—California, Connecticut, New Hampshire, Ohio and Rhode Island—have by statute placed equipment obligations among the legal investments for savings banks (citing the statutes in an appendix).

By the terms of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, sections 6 and 7 (page 455), a revolving fund of $500,000,000 was provided from which advances might be made to the railroads by the President. During Federal control they were to be allowed to issue such "bonds, notes, equipment trust certificates, stock, and other forms of securities" as the President might approve. The President was authorized to purchase from the revolving fund for the United States all or any part of such securities.

By the Act of November 19, 1919, c. 116, 41 Stat. 359, provision was made for reimbursement of the United States for equipment ordered for railroads while under Federal control. The Act specifically provided for the issuance of equipment trust certificates based upon conditional sale, and authorized the President to accept them from the railroads.

Professor Duncan says (page 70) that under this Act the total amount of equipment trust obligations acquired by the United States was $346,555,750, and that the agreement with the Pennsylvania Railroad Company was "drawn upon the Philadelphia lease

plan," the others being upon the conditional sale plan (page 71).

In the New York Times of January 3, 1925, there appeared an advertisement by an investment brokerage firm which (without attempting to follow the form of typographical display) read as follows:

> For January investment. Sound bonds yielding from 3.85% to 8.19%. Government, municipal, railroad equipment trust, public utility, industrial, real estate. Write for our January list of investment suggestions covering the above, which will be forwarded upon request for Circular J–1.

By writers upon economics and finance, in legal text books, in State statutes, in Acts of Congress, by the Interstate Commerce Commission, and in the market place, therefore, these instruments are referred to and regarded as corporate securities and classed, generally, as a form of bond.

Clearly, the certificates in question come within the letter as well as the intent of the law. The subject matter embraces, among other things, various broad classes of documents, and section 1100, previously quoted, shows that the tax is levied on the issuance of the documents themselves:

> the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed.

In this section and in Schedule A the classes are indicated in the most general and least specific

terms. There is no room for fine distinctions; and the broad language—

> all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities—

affords no excuse or reason for withholding the application of the law to any form of obligation well known and universally regarded as a corporate security. It was not necessary for Congress to use the exact terms employed by the Fidelity Trust Company and the Interstate Railroad Company in describing their instruments. General language was sufficient. As stated by Mr. Justice Holmes in *Towne* v. *Eisner*, 245 U. S. 418:

> A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to circumstances and the time in which it is used.

It is insisted, however, that certificates in this particular form have distinguishing marks which remove them from the general class of bonds. It is said that they do not bear interest, as the coupons are described as dividend coupons rather than interest coupons. The difference is one of name only. It is claimed that the dividends represent payments of rental rather than interest upon money loaned; but interest is merely rental upon money, and the so-called dividends are clearly interest, and the exact amount of interest for definite periods upon

money supplied by certificate holders for the purpose of purchasing equipment.

It is claimed that the certificates should not be regarded as bonds because they provide that the dividends or rentals, by whatever name they are called, are payable by the trustee only "from and out of the deferred rentals when paid as provided for" in the lease; but a bond or certificate of indebtedness is none the less such because principal and interest are payable out of a specific fund. It is only necessary to refer to the well known class of corporate securities known as income bonds, where the payment of interest is contingent upon earnings.

These certificates are within both the letter and the spirit of the law. They are issued by a corporation. They have attached to them detachable coupons representing three per cent of the face value of the certificate, payable semiannually on definite dates, and are clearly interest coupons—call them what you will. They may be registered as to principal, and if they are not generally known as "corporate securities" then every one—investors, bankers, students, and text-book writers—is laboring under a mistake.

There are three forms of contract in common use now, whereby the creation of a lien, represented by equipment certificates, is accomplished; a chattel mortgage, a conditional sale, and a lease with an option to purchase. Usually there is a trustee who holds the title or to whom the mortgage runs. Sometimes the certificates are issued directly by the railroad company and certified by the trustee in the same

manner as mortgage bonds. Sometimes, as in the present case, the certificates are issued by the trustee. Since the passage by the States of the legislation now in force, there is practically no difference.

Professor Duncan says:

> But, in general, it is immaterial which plan is used. (Equipment Obligations, page 38.)

and at page 113, he says:

> In view of this situation, the earlier railroad equipment agreements strove to simulate the form of a bailment as faithfully as possible. The terms of the contract spoke of a "lease," "lease warrants," and "rentals." Interest coupons were called "dividend warrants." The interposition of a trustee or car trust association was calculated not only to simplify financing, but also to give greater semblance of reality to the lease arrangement, by separating the buyer and the seller still farther. The option to purchase was given a separateness by being introduced as an additional provision in the contract, independent of the other provisions, and stipulating a nominal purchase price, distinct from rental payments. These advantages are, at the present time, purely of historical interest, and, as will be demonstrated, were never of genuine value outside of those few States where courts were inclined to distinguish between conditional sales and other transactions in which the lease form was used under identical circumstances.

This court and other Federal courts, whenever instruments of this class have come before them,

have always looked beyond the particular form to the real substance of the transaction; and we think the following cases show that the form of the agreement is, for practical purposes, immaterial and taxation is certainly a most practical purpose.

In *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, the locomotive company leased a locomotive engine and tender. The lease provided that the lessee should pay 10 per cent cash and the balance in three instalments. Upon completion of the payment the lessor covenanted to grant, sell, assign, transfer and convey to the lessee the property involved. The question involved was whether the contract of lease was in effect a chattel mortgage under the laws of Illinois. The court held that this was a lien in the nature of a chattel mortgage which under the laws of Illinois must be recorded within a specified time in order to preserve the contract lien. In this connection the court said, at page 672:

> In determining the real character of a contract, courts will always look to its purpose rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase money, it is liable to be defeated by creditors of the purchaser, who is in possession of it. This was held in *Murch* v. *Wright*, 46 Ill. 488. In that case the purchaser took from the seller a piano at the price of $700. He paid $50 down, which was called rent for the first month, and agreed to pay, as rent, $50 each month, until the whole amount

should be paid, when he was to own the piano. The court held, "that it was a mere subterfuge to call the transaction a lease; and that it was a conditional sale, with the right of recision on the part of the vendor, in case the purchaser should fail in payment of his instalments. * * *" That case and the one at bar are alike in all essential particulars.

* * * * *

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch* v. *Wright*, *supra*. There the price of the piano was to be paid in 13 months, and here, that of the engine, $12,093.96, in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment?

See to the same effect *Fosdick* v. *Schall*, 99 U. S. 235, 250; *Huidekoper* v. *Locomotive Works*, 99 U. S. 258.

See also *Myer* v. *Car Co.*, 102 U. S. 1, construing an Iowa statute substantially the same as the Illinois statute.

In *Heryford* v. *Davis*, 102 U. S. 235, a manufacturer of railroad cars hired to a railroad company certain cars for a specified time, with the right and privilege at any time to purchase the cars upon the payment of a stipulated sum. The court in determin-

ing whether or not the agreement was a bailment, conditional sale, or an absolute sale, subject to recordation under the laws of Missouri for the perfection of the lien reserved therein, held that the contract was not a bailment or a conditional sale, but that under it the ownership of the cars passed to the railroad company, and therefore to protect the property from seizure by its creditors the lessor should have recorded the instrument as prescribed by the laws of Missouri for recording mortgages or deeds of trust of personal property. In this connection the court says, at pages 243–246:

> What, then, is the true construction of the contract? *The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.*
>
> Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company *for hire*, for four months, and delivering them for use *for hire*, it is manifest that *no mere bailment for hire was intended.*
>
> * * * * *
>
> No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned. On the contrary, it was stipulated expressly that if the manufacturing company should elect to

take the cars into their own possession, which they reserved the right to do in case of default of payment of the notes, the property should be sold, and of the net amount realized from the sale, so much as should be needed to make the amount remaining due and unpaid on the promissory notes, with the interest that might have accrued thereon, should be retained by the manufacturing company, and the surplus, if any, should be paid over to the railroad company.

What was this but treating the notes given for the sum agreed to be the price of the cars as a debt absolutely due to the vendors? What was it but treating the cars as a security for the debt?

* * * Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. (Italics supplied.)

In *Harkness* v. *Russell*, 118 U. S. 663, the Supreme Court reviewed the law of chattel mortgages, conditional sales and leases in the nature of conditional sales, discussing the laws of the various States, including Pennsylvania. (See page 676.) It is an elaborate opinion and discusses the cases above cited.

See also *Kneeland* v. *American Loan & Trust Company*, 136 U. S. 89; *Chicago Railway* v. *Merchants Bank*, 136 U. S. 268.

In *McGourkey* v. *Toledo & Ohio Central Railway Company*, 146 U. S. 536, the Supreme Court held

that car trust agreements, although in the form of leases, must be treated as mortgages. In this connection the court, at page 568, says:

> As before observed, contracts of this description for the purpose of leasing the rolling stock are by no means uncommon, and it is not improbable that this syndicate may have taken for granted that the raising of the money by car trust certificates issued to themselves or to those in confidential relations with them was but another mode of accomplishing the same result. The law, however, characterizes the transaction as a constructive fraud upon the mortgagee. (In this case the directors of the railroad company held the certificates.)
>
> We think the court below was correct in holding that these leases, so far as they are a security at all, must be treated as mortgages. Reading between the lines of these instruments, it is quite evident that no ordinary letting of property for a fixed rental was contemplated, but that the retention of title by the lessor was intended for the mere security for the payment of the purchase-money. Thus by lease A there was to be a payment of a gross sum of $100,000 upon the delivery of the property, and an annual rental of $40,000, with interest at 8 per cent, with a further provision that if such payments were promptly made for the ten years specified, the property should belong to the railroad company without further conveyance. In case of default, however, the lessor made no provision for resuming

his title to the property, but merely for the resumption of possession for the purpose of sale, as in an ordinary foreclosure of a mortgage. All these provisions are inconsistent with the idea of an ordinary lease of personal property.

See also *Central Trust Company* v. *Groome*, 2 U. S. App. 95, *Central Trust Company* v. *Hiawassee*, 2 U. S. App. 1, and *Frank* v. *Denver & R. G. Ry. Co.*, 23 Fed. 123.

CONCLUSION

In form and in substance, these instruments are corporate securities, and are so regarded by legislatures and by courts; by standard authorities and in common speech, and are within the provisions of the revenue act in question.

The judgment of the Circuit Court of Appeals should be reversed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

JANUARY, 1925.

○

184

No. 582 October Term, 1923

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WM. R. STANSBURY

IN THE

Supreme Court of the United States

EPHRAIM LEDERER, Collector of Internal Revenue of the First District of the State of Pennsylvania,

Petitioner

v.

FIDELITY TRUST COMPANY,

Respondent

Answer of Fidelity Trust Company to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

H. GORDON McCOUCH
Bullitt Building
Philadelphia, Pa.
for Respondent

IN THE

Supreme Court of the United States

October Term, 1923. No.

EPHRAIM LEDERER,
Collector of Internal Revenue of the First District of the State of Pennsylvania, Petitioner,

vs.

FIDELITY TRUST COMPANY, Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

The answer of Fidelity Trust Company respectfully shows:

FIRST. The Judicial Code provides that the decision of the Circuit Court of Appeals in Revenue cases shall be final, subject, however, to review by the Supreme Court of the United States

on certiorari; but under the settled rule of this court as stated in Forsythe vs. Hammond, 166 U. S. 506, the writ of certiorari will only be granted when the circumstances of the case are such that "the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of this nation in its international or external relation," demands the exercise of the power to issue such writs.

This is not such a case as is contemplated by the rule so announced.

The tax here in question was imposed under the Revenue Act of 1918, Sub-division 1, Schedule A, Title XI, Stamp Taxes, which reads:—

> "I. Bonds of Indebtedness: On all bonds, debentures or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities, on each one hundred dollars of face value or fraction thereof five cents: Provided, That every renewal of the foregoing shall be taxed

as a new issue: Provided further, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured."

The Section of the Act under which the tax is sought to be imposed is entitled "Bonds of Indebtedness." It taxes instruments which are recognized evidences of indebtedness when issued by an individual, and as to corporate indebtedness it uses the words "all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities."

As a matter of grammatical construction and of common sense reading of the words of the statute, to what can the words "corporate securities" relate other than to "instruments issued by any corporation with interest coupons or in registered form"? This more clearly appears if we transpose the two qualifying parenthetical sentences, thus, "and all instruments issued by any corporation with interest coupons or in registered form, however termed, known generally as corporate securities."

The words of the statute are definite, precise, grammatically expressed and free from ambiguity. The tax is imposed on "all instruments (however termed) issued by any corporation (with interest coupons or in registered form) known generally as corporate securities."

The instrument sought to be taxed is not a certificate of indebtedness or a corporate security. It is not the obligation of a corporation to pay money owing by it, nor does it evidence an indebtedness secured on the property of a corporation. It is a mere declaration of trust and defines the holder's ownership of the equipment leased to the railroad company and the extent of his interest in the moneys to be received as rental therefor. Neither the railroad company nor the trust company is indebted to the certificate holders. The railroad company is obligated to pay rental for the use of certain equipment, and the trustee, to which such rental is paid, has to turn over to each certificate holder his proportionate share when and as received.

The certificate is merely the evidence of the holder's equitable ownership of an undivided interest in the equipment leased to the railroad

company and the rentals payable therefor. How, then, can such muniments of title be termed "corporate securities"?

Interest is an attribute of a debt. The dividend warrants attached to the equipment certificates are not interest coupons and do not purport to be such.

The reference in this clause of the Act to renewals is also instructive. There can be no renewal of a contract for the conditional sale of a chattel. Either the railroad company becomes the owner of the cars, or the owners repossess themselves of their property. If a new arrangement is made, a new conditional sale contract would have to be entered into.

The last provision of this Section also shows that the instruments to be taxed are those which evidence a debt and provide for its payment.

On page 6 of the brief in support of the petition, the Government quotes an extract from the opinion of his Honor Judge Dickinson in the determination of the instant case in the District Court, which seems to call for comment on the part of the respondent.

The learned Judge before whom the case was

tried calls attention at the outset of his opinion to the fact that the question for decision is the same as was ruled by him in refusing judgment for want of a sufficient affidavit of defense, and that he felt bound to follow the opinion then filed as the law of the case; but desired to add thereto some additional observations. We shall, therefore, treat the two opinions as one, the second being merely a continuation of the first. In the first opinion (Record 47) he said:

> **"The certificate is not within the literal verbiage of the Act of Congress, not being 'a certificate of indebtedness issued by any person' nor 'an instrument issued by any corporation.'** If the taxing hand has been laid only upon these specific forms of what are generally known as securities it must be withdrawn from the 'trust certificates' now under view. This would mean that they are the exceptions among the general class of securities and are exempt because the very effort made in the framing of the law to include all forms of securities of this general character has, in verbal nicety, excluded them."

This confirms our contention that these certificates were not "issued" by the Fidelity Trust Company within the meaning of that word as used in the statute. So far as the Fidelity Trust Company is concerned, they are merely certificates of ownership, without any corporate obligation to do more than collect and distribute to the owners (of whom the holder of the certificate is one) the rentals of certain rolling stock leased by their agent. There would be no difference whatsoever in the form of the certificate or in its legal effect if there were an individual trustee instead of a corporate trustee. The opinion then, however, continues as follows (Record 47):

> "The Act of Congress, however, includes more than the two kinds of securities mentioned because we think it includes everything known generally as corporate securities";

but the writer frankly adds (Record 48):

> "There are two obstacles to be surmounted before reaching this construction. One is that the rule of the nearest antecedent makes the quoted phrase relate to and serve as a definition of the described kinds of 'instru-

> ments issued by corporations,' and the other is that the finding of a meaning to tax all instruments 'commonly known as corporate securities' involves the presence of a grammatical error in the Act of Congress."

Without attempting to meet these objections he contents himself with saying (Record 48):

> "Neither of these obstacles are however insurmountable, if this was the meaning of Congress, and we so find."

It is thus entirely clear that the learned Judge did not and could not find that the statute **in words** imposed a tax on the certificates here in question. Convinced, however, that Congress intended to tax them, he sought to demonstrate that if not taxed in specific form they are, when analyzed, in effect in the same class as those so taxed. This is evident from the concluding passage of his first opinion, where he says (Record 48):

> "The real truth back of the whole discussion is that if these certificates are not taxable, it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the

obligation of debt entered into by the carrier corporation. The real security is the promise not of one corporation but of two to pay to the certificate holders the sums due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for payment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. **This it is true was not the form of the promise,** but such it was in substance because it was a promise to pay a sum which was the exact (and not accidental but prefixed) equivalent of the advances, with interest."

But this is directly at variance with the decision in United States v. Isham, 84 U. S. 496, that the liability of an instrument to stamp duty is determined by the form and face of the instrument.

The learned Judge himself has twice said that these certificates are not within the literal wording of the Act of Congress, and the law forbids extending the provisions of the Act beyond the clear import of the language used.

In his second opinion (Record 34) he says:

> "We stated before, and the experience has been repeated, that when we were listening to the argument of counsel for plaintiff, the impression produced was that these certificates had not been taxed, but when we came to read the Act of Congress we became convinced that Congress had taxed them.
>
> **"We have already found, and now repeat the finding, that as we read this Act of Congress these certificates are not among the taxable things which Congress, by the verbiage employed, has expressly named, and that the words "commonly known as corporate securities" cannot be read to refer to these certificates without ignoring the rule of reference to the nearest antecedent nor without imputing to Congress a grammatical error."**

Notwithstanding that he has thus twice found that the certificates in the case at bar are not "certificates of indebtedness" he goes outside of the document in question and proceeds to argue that they really are in effect such certificates and seemingly confuses the equipment trust certificates with the lease or bailment of the cars made by the

trustee to the railroad company. Then again, because some equipment certificates are in the form of certificates of indebtedness, and therefore within the purview of the Act, he argues that other equipment certificates which do not evidence an indebtedness must also be considered as included. In other words, he treats the act as though it had imposed a stamp tax on all equipment trust certificates and respondent were seeking to avoid the payment of the tax because these equipment trust certificates were drawn under what is known as the Philadelphia Plan. Thus he says (Record 40):

> "We adhere also to the view that these car trust certificates are taxable just as other car trust certificates are taxable, because they are in reality, although not in form, the same as the others. They are all alike car trust certificates."

He thus ignores the vital difference in form, substance and legal effect between equipment certificates evidencing an indebtedness and the equipment certificates here considered.

Twice in his opinion he unqualifiedly asserted that on the form and face of the equipment cer-

tificate it was not within the clear import of the words of the statute.

Twice in his opinion he admitted a doubt as to what the true construction was.

As pointed out in the opinion of the Circuit Court of Appeals:—

> "Car trust certificates **such as here involved,** have been so long and so largely used in the financial world and are so vital a factor in the financing and equipment of railroads, that it would seem that Congress, had it intended taxing them, would have so covered them by specific designation or by proper generic description, as to leave no question of its intent."

SECOND. It is apparent, on inspection of the form and face of the certificate, that it is not subject to stamp tax within the clear import of the words of the statute (United States vs. Isham, 84 U. S. 496), and it is respectfully submitted that the petition for certiorari should be denied.

H. GORDON McCOUCH,
for Respondent.

FILE COPY

No. 184. October Term, 1924

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IN THE

Supreme Court of the United States

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of the State of Pennsylvania, Petitioner

v.

FIDELITY TRUST COMPANY

On certiorari to the United States Circuit Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

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v.

FIDELITY TRUST COMPANY

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit

ARGUMENT FOR RESPONDENT

The question for determination is whether equipment trust certificates issued under what is known as the Philadelphia Plan (Record 10) are subject to stamp taxes under the Revenue Act of 1918.

It is necessary at the outset to remember that there are various forms of equipment trust certificates, some of which, being notes or bonds of the

Railroad Company, lessee, are obviously certificates of indebtedness and subject to stamp tax; but the certificates in the case at bar do not fall within this category. This form was devised more than thirty years ago with the distinct object in view of creating a certificate of ownership—not one of indebtedness—and therefore not liable in the hands of holders to taxation under the then laws of the State of Pennsylvania.

For a proper consideration of this subject it is essential that a clear understanding be had of the nature of such certificates.

A railroad company, needing additional rolling stock, goes to its banker, who undertakes to arrange for the building of the cars needed according to specifications furnished and the hiring of the same to the railroad company under a form of bailment, by which, on payment of all rental reserved, the railroad company is given the option to purchase the equipment for one dollar. The operation is financed by the banker arranging with a trust company to receive subscriptions for the purchase of the desired rolling stock, to contract with the car builders for the purchase of the

same, and as agent for the owners to lease the equipment to the railroad company at rentals agreed upon, and to issue to the subscribers certificates evidencing their equitable ownership and certifying that out of the rentals to be received by the trustee the holders will be entitled to the amount of such certificate with dividends as stated.

It is to be observed that the certificate is not a certificate of indebtedness; that there is no debtor; that it is merely the declaration of the trustee, as agent of the holder of the certificate, that it will collect for his benefit and that of other owners the rentals expressed in the lease and distribute the same pro rata. If not paid at maturity no action of debt would lie upon such certificate.

The Government devotes the first part of its argument to showing that equipment certificates are frequently referred to by writers on economics and finance as bonds or notes or corporate securities.*

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*The reference to page 16 of Kenneth Duncan's book on "Equipment Obligations" for a discussion of the "Philadelphia Plan" is somewhat unfortunate. Mr. Duncan fell into the common error of supposing that those words referred to the bailment of the cars, instead of to the form of the equipment certificate. His attention was called to the matter and he stated that he would revise what he had written if a second edition of his book were printed.

Such description is quite proper where the certificates referred to are the direct obligation of the Railroad Company lessee, but not where the certificates are in the form of those taxed in the case at bar.

The Government then states its position as follows: "This Court and other Federal Courts, whenever instruments of this class have come before them, have always looked beyond the particular form to the real substance of the transaction; and we think the following cases show that **the form of the agreement is for practical purposes immaterial and taxation is certainly a most practical purpose.**"

This is followed by a review of cases in which the question at issue was whether the contract with the railroad company for the use of the equipment was valid as a bailment or a conditional sale.

We submit that this statement of the law, however pertinent to the matters at issue in the cases referred to, is, when applied to the case at bar, directly at variance with the decision of this Court in **United States v. Isham,** 84 U. S. 496,

that the liability of an instrument to stamp duty is determined by *the form and face of the instrument.* The learned Judge of the District Court, before whom the case was tried, fell into the same error, and we shall hereafter advert to it more particularly.

The tax here in question was imposed under the Revenue Act of 1918, Sub-division 1, Schedule A, Title XI, Stamp Taxes, which reads:—

> "I. Bonds of Indebtedness: On all bonds, debentures or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities, on each one hundred dollars of face value or fraction thereof five cents: Provided, That every renewal of the foregoing shall be taxed as a new issue: Provided further, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured."

The Section of the Act under which the tax is sought to be imposed is entitled "Bonds of Indebtedness." It taxes instruments which are recognized evidences of indebtedness when issued by an individual, and as to corporate indebtedness it uses the words "all instruments, however termed, issued by any corporation with interest coupons or in registered form known generally as corporate securities."

As a matter of grammatical construction and of common sense reading of the words of the statute, to what can the words "corporate securities" relate other than to "instruments issued by any corporation with interest coupons or in registered form"? This more clearly appears if we transpose the two qualifying parenthetical sentences, thus, "and all instruments issued by any corporation with interest coupons or in registered form, however termed, known generally as corporate securities."

The words of the statute are definite, precise, grammatically expressed and free from ambiguity. The tax is imposed on "all instruments (however termed) issued by any corporation

(with interest coupons or in registered form) known generally as corporate securities."

The equipment certificate here taxed is not a certificate of indebtedness or a corporate security. It is not the obligation of a corporation to pay money owing by it, nor does it evidence an indebtedness secured on the property of a corporation. It is a mere declaration of trust and defines the holder's ownership of the equipment leased to the railroad company and the extent of his interest in the moneys to be received as rental therefor. Neither the railroad company nor the trust company is indebted to the certificate holders. The railroad company is obligated to pay rental for the use of certain equipment, and the trustee, to which such rental is paid, has to turn over to each certificate holder his proportionate share when and as received.

The certificate is merely the evidence of the holder's equitable ownership of an undivided interest in the equipment leased to the railroad company and the rentals payable therefor. How, then, can such muniments of title be termed "corporate securities"?

Interest is an attribute of a debt. The dividend warrants attached to the equipment certificates are not interest coupons and do not purport to be such.

The reference in this clause of the Act to renewals is also instructive. There can be no newals of a contract of bailment of the cars with option to purchase. Either the railroad company becomes the owner of the cars, or the owners repossess themselves of their property. If a new arrangement is made, a new contract would have to be entered into and recorded as provided in the Car Trust Statutes.

The last provision of this Section—"Provided further, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured"—also shows that the instruments to be taxed are those which evidence a debt and provide for its payment.

The learned Judge before whom the case was tried in his first opinion (Record 23) said:

> "The certificate is not within the literal verbiage of the Act of Congress, not being 'a

> **certificate of indebtedness issued by any person' nor 'an instrument issued by any corporation.'** If the taxing hand has been laid only upon these specific forms of what are generally known as securities it must be withdrawn from the 'trust certificates' now under view. This would mean that they are the exceptions among the general class of securities and are exempt because the very effort made in the framing of the law to include all forms of securities of this general character has, in verbal nicety, excluded them."

This confirms our contention that these certificates were not "issued" by the Fidelity Trust Company within the meaning of that word as used in *the statute.*

Edwards v. Chile Copper Co., 273 Fed. 452.

They are not the "securities of the Fidelity Trust Company." There would be no difference whatsoever in the form of the certificate or in its legal effect if there were an individual trustee instead of a corporate trustee.

To hold otherwise would lead to the absurd result that where the trustee was a corporation the certificate would be taxable, but that if an individual was trustee it would not.

The opinion then, however, continues as follows (Record 23):

> "The Act of Congress, however, includes more than the two kinds of securities mentioned because we think it includes everything known generally as corporate securities";

but the writer frankly adds (Record 24):

> "There are two obstacles to be surmounted before reaching this construction. One is that the rule of the nearest antecedent makes the quoted phrase relate to and serve as a definition of the described kinds of 'instruments issued by corporations,' and the other is that the finding of a meaning to tax all instruments 'commonly known as corporate securities' involves the presence of a grammatical error in the Act of Congress."

Without attempting to meet these objections he contents himself with saying (Record 24):

> "Neither of these obstacles are however insurmountable, if this was the meaning of Congress, and we so find."

It is thus entirely clear that the learned Judge did not and could not find that the statute **IN WORDS** imposed a tax on the certificates here in question. Convinced, however, that Congress intended to tax them, he sought to demonstrate that if not taxed in specific form they are, when analyzed, in effect in the same class as those so taxed. This is evident from the concluding passage of his first opinion, where he says (Record 24):

> "The real truth back of the whole discussion is that if these certificates are not taxable, it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the obligation of debt entered into by the carrier corporation. The real security is the promise not of one corporation but of two

to pay to the certificate holders the sums due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for payment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. **THIS IT IS TRUE WAS NOT THE FORM OF THE PROMISE,** but such it was in substance because it was a promise to pay a sum which was the exact (and not accidental but prefixed) equivalent of the advances, with interest."

And so the Government here contends.

But this is directly at variance with the decision in **United States v. Isham,** 84 U. S. 496, that the liability of an instrument to stamp duty is determined by the form and face of the instrument.

It cannot be successfully contended that these certificates are within the literal wording of the Act of Congress, and the law forbids extending the provisions of the Act beyond the clear import of the language used.

In the second opinion of the trial judge (Record 16) he says:

> **"We have already found, and now repeat the finding, that as we read this Act of Congress these certificates are not among the taxable things which Congress, by the verbiage employed, has expressly named, and that the words 'commonly known as corporate securities' cannot be read to refer to these certificates without ignoring the rule of reference to the nearest antecedent nor without imputing to Congress a grammatical error."**

Notwithstanding that he has thus found that the certificates in the case at bar are not "corporate securities" he goes outside of their wording and proceeds to argue that they really are in effect such and seemingly confuses the equipment trust certificates with the lease or bailment of the cars made by the trustee to the railroad company. Then again, because some equipment certificates are in the form of certificates of indebtedness, and therefore within the purview of the Act, he argues that other equipment certificates which do not evidence an indebtedness must also be con-

sidered as included. In other words, he treats the act as though it had imposed a stamp tax on all equipment trust certificates and respondent were seeking to avoid the payment of the tax because these equipment trust certificates were drawn under what is known as the Philadelphia Plan. Thus he says (Record 20):

> "We adhere also to the view that these car trust certificates are taxable just as other car trust certificates are taxable, because they are in reality, although not in form, the same as the others. They are all alike car trust certificates."

And this is the Government's position on this appeal.

Petitioner claims the right to look "beyond the particular form to the real substance of the transaction" and that "the form of the agreement is for practical purposes immaterial and taxation is certainly a most practical purpose."

Both ignore the fact that the law for construing Acts of Congress imposing stamp duties is the very opposite of the view for which they contend.

United States v. Isham, 84 U. S., 496, at page 504:

"The liability of an instrument to stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.

"If there is a doubt as to the liability of the instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B. in **Girr v. Scudds** (11 Exchequer 191) 'a tax cannot be imposed without clear and express warrant for that purpose.'"

In **Gould v. Gould,** 245 U. S. 151, the Court laid down this rule:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. **United States v. Wigglesworth,** 2

Story, 369; **American Net & Twine Co. v. Worthington,** 141 U. S. 468, 474; **Renzinger v. United States,** 192 U. S. 38, 55."

In the very recent case of **United States v. Merriam,** 263 U. S. 179, Mr. Justice Sutherland, speaking for the Court, specifically negatives the contention of Petitioner in these words:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. **Gould v. Gould,** 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in **Partington v. Atty. Gen.,** L. R. 4 H. L. 100, 122. 'I am not at all sure that in a case of this kind—a fiscal case—form is not

amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see **Eidman v. Martinez,** 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515."

As pointed out in the opinion of the Circuit Court of Appeals:

> "Car trust certificates **such as here involved,** have been so long and so largely used in the financial world and are so vital a factor in the financing and equipment of rail-

> roads, that it would seem that Congress, had it intended taxing them, would have so covered them by specific designation or by proper generic description, as to leave no question of its intent."

It is apparent, on inspection of the **form and face of the certificate,** that it is not subject to stamp tax **within the clear import of the words of the statute,** and it is respectfully submitted that the appeal should be dismissed with costs.

H. GORDON MCCOUCH,
JAMES MCMULLAN,
Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 184.—October Term, 1924.

Ephraim Lederer, Collector of Internal Revenue for the First District of the State of Pennsylvania, Petitioner, *vs.* Fidelity Trust Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 26, 1925.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the Fidelity Trust Company to recover $450 and interest paid by it under protest for internal revenue stamps which the Collector, Lederer, required it to attach to railroad equipment certificates drawn in a form set forth. The parties agree that the only question is whether these certificates are subject to a stamp tax under the Act of February 24, 1919, c. 18, Title XI, § 1100, and Schedule A (1); 40 Stat. 1057, 1133, 1135. The section imposes a tax according to the schedule and the material part of the schedule is as follows: "1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments however termed, issued by any corporation with interest coupon or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents." The question more narrowly stated is whether the certificates are instruments issued &c. known generally as corporate securities. The Circuit Court of Appeals reversing the judgment of the District Court held that they were not within the schedule, that "no indebtedness is involved or obligation incurred by the trustee to the holder, but it is simply a certificate of the holder's right to proportionate participation in a rental when paid." 289 Fed. Rep. 1009, 1012. A writ of certiorari was granted by this Court.

Using a familiar device the Fidelity Trust Company agreed to furnish and let to the Interstate Railroad Company 500 speci-

fied cars and the lessee agreed to pay $90,000, being one-tenth of the cost of the cars, annually at certain dates, and three per cent. half yearly on the part then unpaid. When the whole amount should be paid the trustee agreed to sell the cars to the Railroad Company for one dollar. As part of the same transaction by an instrument reciting that subscriptions had been secured through certain bankers to a fund, to be known as Interstate Railroad Equipment Trust, Series 'C,' for the payment of the price of the railroad equipment described in the lease, and that the trustee proposed 'to secure to the parties subscribing' to the fund the payment thereof in ten annual instalments with interest at six per cent., the trustee covenanted with the railroad on receipt of the money subscribed to issue to the bankers the certificates in question here. The essential features are that the bearer or registered holder is entitled to one share of $1,000 in Interstate Railroad Equipment Trust, Series 'C,' in accordance with the above agreement, referred to; that the principal shall be payable at the dates of the payments by the railroad, one-tenth of the certificates, identified by number, each year, and in the meantime dividends will be payable as evidenced by dividend warrants attached, principal and interest payable in gold &c., "but only from and out of the deferred rentals as provided in" the lease referred to.

The petitioner asks us to look through the form of the arrangement and give it a somewhat different meaning. The respondent on the other hand says in the language of *United States* v. *Isham*, 17 Wall. 496, 'whatever upon its face (the instrument) purports to be, that it is for the purpose of ascertaining the stamp duty.' We are content to adopt the respondent's rule for this case, as upon any rule the result seems to us clear.

As a matter of common speech, to which the statute refers, we have no doubt that these instruments would be known as corporate securities. They would be called so more accurately than some other documents which we believe also would be known generally by that name. Their purpose, as stated in the agreement of the trustee with the railroad, is to secure payment to the holder with interest. They do nothing else. We do not regard the precise limits of the Trust Company's undertaking as important. If it were only to collect and pay money received by the Company under the secured contract of the Railroad it would be a security

for money payment. But the counsel for the Company seemed not prepared to argue that the Company could not put the money received from the Railroad into its general account without a breach of trust, and give the certificate holder cash or a check for his interest or principal. But be the undertaking greater or less, the security better or worse, we cannot regard these certificates as anything but corporate securities by general understanding and in fact.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.